

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

ORIGINAL
77-7103
77-7115

United States Court of Appeals

For the Second Circuit

CANDACE VAN ALEN,

Plaintiff-Appellant-Appellee,

—against—

DOMINICK & DOMINICK, INCORPORATED and
PAUL deGIVE,

Defendants-Appellees-Appellants.

JOINT APPENDIX

VOLUME III

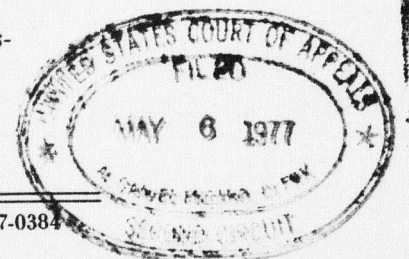
Pages A-573 — A-831

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TABLE OF CONTENTS

	<u>Page</u>
Docket Entries	A-1
Summons	A-8
Complaint	A-9
Amended Complaint, dated 4/17/72	A-17
Schedule "A", attached to Amended Complaint	A-20
Second Amended Complaint.....	A-26
Report of United States Magistrate (re Jury Demand)	A-31
Endorsement Order (re Jury Demand), dated 4/18/74	A-35
Page 9 of Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment	A-36
Excerpts from Memorandum of Defendants, dated August 1, 1974, in Opposition to Plaintiff's Motions for Leave to Amend and for Summary Judgment against Defendant Dominick & Dominick	A-37
Page 14 of Reply Memorandum of Plaintiff to Defendants' Memorandum in Opposition to Plaintiff's Motion for Leave to Amend and for Summary Judgment	A-45
Endorsement Order (re Leave to Amend) dated November 19, 1974	A-46
Plaintiff's Third Amended Complaint	A-47
Defendants' Answer to Third Amended Complaint	A-53
Endorsement Order Dismissing the Fifth Count, dated June 30, 1975	A-56
Notice of Settlement and Order, dated 7/11/75	A-60
Pre-Trial Order, dated March 17, 1976	A-62
Defendants' Amendment to Pre-Trial Order, dated August 5, 1976	A-114
Excerpts from Transcript of the Proceedings of U.S. District Court held on November 8-12 and 15-17, 1976..	A-151

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
<u>Witnesses</u>	
Candace Van Alen	
Direct	A-157
Cross	A-184
Redirect	A-296
Recross	A-299
Further Redirect	A-301
 Paul deGive	
Direct	A-303
Cross	A-608
Redirect	A-660
 Avery Rockefeller	
Direct	A-674
Cross	A-675
 John J. McDonald	
Direct	A-689
Cross	A-702
 Mary Grace Watson - Deposition	A-721
Thomas C. Mitchell - Deposition	A-737
 Order and Opinion, dated December 22, 1976	A-772
Notice of Motion for Attorneys' Fees, dated January 14, 1977	A-810
Affidavit of Jeffrey A. Barist in Support of Motion for Attorneys' Fees	A-812
Exhibit A - Letter from Jerome Kamerman to Hon. Morris E. Lasker, dated January 12, 1977	A-817
Exhibit B - Schedule of Depositions	A-818

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
Affidavit of Jerome Kamerman in Opposition to Defendants' Motion Requiring Plaintiff to Pay to Defendants Reasonable Attorneys' Fees	A-820
Reply Affidavit of Jeffrey A. Barist in Support of Defendants' Motion for Reasonable Attorneys' Fees...	A-825
Endorsement Order (re Attorneys' Fees) dated January 25, 1977	A-828
Final Judgment, dated January 27, 1977	A-829
Plaintiff's Notice of Appeal, dated February 25, 1977..	A-830
Defendants' Notice of Appeal, dated February 25, 1977..	A-831

EXHIBITS

Plaintiff's Exhibit 1 - Copies of NYSE Rules 342, 405 and 408, in effect during the period covered by the complaint, and NYSE Educational Circular No. 252, dated December 20, 1968	A-832
Plaintiff's Exhibit 2 - Schedules reflecting the frequency and number and money value of securities transactions executed by defendants in plaintiff's accounts at Dominick, Bank of New York and First National City Bank during the period from February 10, 1969 through March 3, 1970	A-842
Plaintiff's Exhibit 8 - Frequency and Number of Securities Transactions Executed by Defendants in Plaintiff's Accounts	A-850
Plaintiff's Exhibit 10 - deGive's Technical Comments dated May 26, 1969	A-851
deGive's Technical Comments dated January 12, 1970..	A-852
Plaintiff's Exhibit 11 - Excerpts from Dominick and Dominick's Manual, pages 12, 20, 108	A-853
Plaintiff's Exhibit 12 For Identification - deGive's Diary	A-856
Plaintiff's Exhibit 14 - Eleanor deGive's Confirmation File	A-870

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
Plaintiff's Exhibit 20 - Summary of Month End Value of Plaintiff's Portfolio, from January 31, 1969 to March 31, 1970	A-891a
Plaintiff's Exhibit 27 - Copy of Form Letter dated April 29, 1953 to Empire Trust Company from Candace Van Alen	A-892
Plaintiff's Exhibit 28 - Opening Account Card for Candace Van Alen at Dominick & Dominick, dated July 23, 1953 (cash account) and May 16, 1963 (margin account)	A-893
Plaintiff's Exhibit 29 - Dominick & Dominick "Customer's Agreement", dated May 16, 1963 and signed by Candace Van Alen	A-895
Plaintiff's Exhibit 30 - Letter of Instructions Relative to Custodian Account for Candace Van Alen, dated October 23, 1969	A-897
Plaintiff's Exhibit 31 - Letter, dated October 24, 1969, Candace Van Alen to The Bank of New York	A-901
Plaintiff's Exhibit 60 - deGive's Technical Comments dated October 13, 1969	A-902
Plaintiff's Exhibit 63 - Eleanor deGive Account at Dominick & Dominick	A-903
Plaintiff's Exhibit 72 (Excerpts) - Plaintiff's Second Set of Interrogatories dated February 1, 1973 - Questions 2c, 2d, 2f, 5a, 5f, 6a and 6b -- and Defendant Dominick's Answers to those respective questions dated April 2, 1973	A-910
Defendants' Exhibit 2 - Letter, dated April 3, 1970, Candace Van Alen to Paul deGive	A-919
Defendants' Exhibit 6 - Form Letter, dated December 24, 1948, Candace Van Alen to Empire Trust Company..	A-920
Defendants' Exhibit 7 - Empire Trust Company Internal Form, dated January 12, 1949, re Candace Van Alen's Custody Accounts	A-926

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
Defendants' Exhibit 14 - Letter, dated April 3, 1970, from Candace Van Alen to First National City Bank...	A-928
Defendants' Exhibit 25 - Letter, dated September 21, 1962, from Mary Grace Watson to Howard R. Pugh	A-929
Defendants' Exhibit 27 - Letter, dated July 19, 1963, Paul deGive to Candace Van Alen	A-930
Defendants' Exhibit 28 - Loan Offering Sheet, dated Sept. 22, 1965, re Proposed \$200,000 Loan to Candace Van Alen	A-931
Defendants' Exhibit 30 - Office Memorandum, dated June 15, 1967, to Loan Department from L. Clark, Jr.	A-933
Defendants' Exhibit 31 - Internal documents of Bank of New York relating to Candace Van Alen loans at Bank of New York in 1967 and 1968:	
31-A - Memorandum re Loans to Candace Van Alen on January 13, 1967, May 15, 1967 and April 15, 1968	A-935
31-B - Loan Liability Ledger	A-936
31-C - Form, dated April 15, 1968, entitled "Demand Loan"	A-937
31-D - Form, dated October 22, 1968, entitled "Demand Loan"	A-939
31-E - Statement of Purpose of the Proceeds of a Stock-Secured Extension of Credit by a Bank (Federal Reserve Form U-1), dated April 15, 1968, and signed by Candace Van Alen	A-940
31-F - Form entitled "Liability of Candace Van Alen"	A-942
Defendants' Exhibit 36 - Letter, dated September 10, 1954, Paul deGive to Mrs. James H. Van Alen	A-943
Defendants' Exhibit 37 - Letter, dated January 18, 1955, Paul deGive to Mrs. James H. Van Alen	A-944

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
Defendants' Exhibit 38 - Letter, dated June 15, 1955, Paul deGive to Mrs. James Van Alen	A-945
Defendants' Exhibit 39 - Letter, dated June 5, 1955, Candace Van Alen to Paul deGive	A-946
Defendants' Exhibit 40 - Letter, dated June 7, 1962, Candace Van Alen to Paul deGive	A-948
Defendants' Exhibit 42 - Letter, dated November 19, 1968, Paul deGive to Mary Grace Watson	A-949
Defendants' Exhibit 43 - Letter, dated April 3, 1970, Candace A. Van Alen to Dominick & Dominick, Inc. ..	A-950
Defendants' Exhibit 44 - Letter, dated August 13, 1969, Paul deGive to Candace Van Alen	A-951
Defendants' Exhibit 45 - Letter, dated November 20, 1969, Paul deGive to Mrs. James Van Alen	A-952
Defendants' Exhibit 46 - Letter, dated October 14, 1968, Mrs. James H. Van Alen to Bank of New York, atten- tion Mr. Muecke	A-953
Defendants' Exhibit 47 - Letter, dated January 16, 1968, to Mrs. James H. Van Alen	A-954
Defendants' Exhibit 60 - Letter, dated October 10, 1968, Mary Grace Watson to The Bank of New York	A-955
Defendants' Exhibit 84 - Letter, dated April 9, 1953, Gordon Murphy to Paul deGive	A-956
Defendants' Exhibit 98(A) - Candace Van Alen, Chrono- logical List of Transactions by Trade Date, 1964- 1968, Combined Accounts at Dominick and Empire Trust/Bank of New York	A-958
Defendants' Exhibit 98(B) - Candace Van Alen, Chrono- logical List of Transactions by Trade Date, Febru- ary 11, 1969 - March, 1970, Combined Accounts at Dominick, Bank of New York and First National City Bank	A-977

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
Defendants' Exhibit 98(C) - Candace Van Alen, Account at Empire Trust/Bank of New York, Schedule of Transactions 1964-1968	A-983
Defendants' Exhibit 98(D) - Candace Van Alen, Account at Dominick, Schedule of Transactions, 1953-1968 ...	A-992
Defendants' Exhibit 98(F) - Schedule reflecting Candace Van Alen's Profit and (Loss) on Dominick and Empire Trust/Bank of New York Accounts	A-1005
Defendants' Exhibit 100 - Letter, dated November 18, 1968, Mary Grace Watson to Paul deGive	A-1007
Defendants' Exhibit 111 - Letter, dated October 14, 1968, Wyndham R. Hunt to Mary Grace Watson	A-1008
Defendants' Exhibit 116 - deGive's "Technical Comments":	A-1009
#295 - February 11, 1969	A-1010
#296 - February 17, 1969	A-1012
#305 - April 30, 1969	A-1013
#306 - May 5, 1969	A-1015
#328 - October 20, 1969	A-1016
#329 - October 27, 1969	A-1017
#331 - November 10, 1969	A-1018
#338 - December 29, 1969	A-1019
#342 - January 26, 1970	A-1023
#347 - March 2, 1970	A-1024
Defendants' Exhibit 233 - Paragraph (c) of Letter, dated March 8, 1974, Philip Greenberg of Kamerman & Kamerman to Vincent R. FitzPatrick, Jr. of White & Case	A-1025
Defendants' Exhibit 242 - Commissions and Losses in Candace Van Alen Accounts, February 1969-April 1970.	A-1027
Defendants' Exhibit 244 - Securities Purchased for Candace Van Alen, February 11, 1969 - March, 1970...	A-1028
Defendants' Exhibit 245 - Summary of Candace Van Alen Loans	A-1029
Court Exhibit 1 - Defendants' Memorandum in Support of Defendants' Motion to Suppress Testimony and Docu- ments	A-1030

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
Court Exhibit 2 - Letter, dated March 25, 1971, Kamerman & Kamerman to Dominick & Dominick	A-1040
Court Exhibit 3 - Letter from Jerome Kamerman to Thomas F. Carey, Assistant Compliance Director of Dominick & Dominick, dated February 19, 1971	A-1041
Court Exhibit 4: Letter from Charles N. Shaffer to Judge Pierce, dated November 16, 1976	A-1042
Affidavit of Jerome Kamerman in Opposition to Defendants' Motion to Suppress Testimony and Documents	A-1043
Exhibit A - Notes of Meeting with Carey of Dominick & Dominick in October of 1970	A-1046
Exhibit B - Letter from Carey to Jerome Kamerman, dated November 3, 1970 ..	A-1047
Exhibit C - Copy of diary entry of Jerome Kamerman dated December 28, 1970 ..	A-1048
Exhibit D - Copy of diary entry of Jerome Kamerman dated June 21, 1971	A-1049
Plaintiff's Memorandum in Opposition to Defend- ants' Motion to Suppress Testimony and Docu- ments	A-1050

MR. SHAFFER: That is true, that is absolutely true. I will go on without them.

Q Mr. deGive, did you make diaries during this period of time of your conduct and activity with respect to my client's account in conversations you had with him?

A No.

Q Did you make notes on calendar pages?

MR. BARIST: At what time?

MR. SHAFFER: In 1968, '69 or '70.

A 1968, '69, or '70?

Q Yes.

A I did not make notes on the calendar pages as that were contemporary with the calendar pages.

Q I understand that, but did you make notes of events that you offered to Mr. Kamerman on one occasion as being events which had occurred in 1968 or '69 or '70 and which represented to be events that you noted at or about the time they occurred?

MR. BARIST: Objection, your Honor. I have a motion. I wish to be heard. With the Court's permission, I will submit a memorandum of law.

THE COURT: If the witness did make entries on pages, whether they were contemporaneous with the dates or not, are you objecting to a writing with reference to

any such notation?

MR. BARIST: No, your Honor. We have here a very strange, I might say, set of events. The witness' testimony in pretrial discovery was that he made no contemporaneous records of conversations with Mr. or Mrs. Van Alen.

MR. SHAFFER: Excuse me, Mr. Barist. Could I have the witness excused, your Honor?

THE COURT: All right. Step down, sir, and just outside that door.

(Witness temporarily excused)

MR. BARIST: The witness' testimony, your Honor, in pretrial discovery was very clear that he had no contemporaneous records of conversations with Mr. and Mrs. Van Alen. There did occur this discussion, and what we are having here, your Honor, is the attempt by plaintiff's counsel to use the unethical conduct of plaintiff's counsel to create an unfavorable implication to my client.

Your Honor, I would like to submit to the Court, if I could, defendants' memorandum of law with respect to the calendars, and I would ask that the memorandum, and particularly the letter in it, be marked as a Court's exhibit.

2 THE COURT: Mark it as a Court's exhibit.

3 Mark them.

4 MR. BARIST: What happened was this, your
5 Honor. In the very back, if you will look with me at this
6 letter, if you remember, Mr. Shapiro's testimony in this
7 case, your Honor, when Mr. Shapiro was called and he said
8 he belongs to the accounting firm of Kamerman & Shapiro,
9 and Mr. Shaffer, who went out of his way to establish that
10 Mr. Jerome Kamerman, his co-counsel, was not a partner
11 in Kamerman & Shapiro? Well, what we have here in the
12 back is a letter dated March 25, 1971, on the stationery
13 of Kamerman & Kamerman, certified public accountants,
14 addressed to Mr. deGive, asking Mr. deGive to come up and
15 talk to Mr. Kamerman about -- Mr. Kamerman's certified
16 public accountant, as about certain records.

17 Mr. deGive did go up.

18 On his deposition in this case Mr. deGive made
19 it very clear that he brought with him at that time
20 certain diary entries. The diary entries or the diary
21 pages are Plaintiff's Exhibit, whatever it is, in evidence
22 or for identification. Mr. deGive was asked, were these
23 contemporaneous records? Mr. deGive said no. Mr. deGive
24 was then asked, "What are these records?" He said,
25 "Before I went up to see Mr. Kamerman, who I thought was

1
2 a certified public accountant, I went through my tax
3 records, which included diary slips, and I made notes on
4 them to see if I could jog my memory as to what
5 conversations I had with Mr. or Mrs. Van Alen. That is
6 all these records are. I don't rely on them. They don't
7 jog my memory. They are not contemporaneous records."

8 The last question that Mr. Shaffer asked Mr.
9 deGive was: "Well, did you use these diary records to
10 tell Mr. Kamerman that these diary records were something
11 other than what you have been telling us?"

12 When Mr. Kamerman brought Mr. deGive up to his
13 office, he knew full well he was an attorney representing
14 Mrs. Van Alen looking for a claim. Under the canons of
15 ethics and under the decisions of the appropriate bar
16 associations, Mr. Kamerman was under an obligation to
17 tell Mr. deGive, "I am an attorney, I represent Mrs.
18 Van Alen, I am looking at you as someone who I may have
19 a claim against."

20 Instead of doing what the canons required, Mr.
21 Kamerman wrote him a letter on CPA stationery.

22 I say very simply: Mr. deGive, if asked the
23 question, "Did you use these diaries to tell Mr.
24 Kamerman something other than what you have been telling
25 us?", is going to say no. But I say that the plaintiff's

1
2 counsel cannot use his violation of the canons of
3 ethics to attempt to create some new smokescreen by
4 which somehow the implication is going to be left that
5 Mr. deGive used these diaries for some improper purpose
6 or told Mr. Kamerman something other than what Mr. deGive
7 has been testifying to under oath for the last five years.

8 MR. SHAFFER: Have you concluded?

9 MR. BARIST: Yes, sir.

10 MR. SHAFFER: Your Honor, I would like to be
11 heard very briefly. If allowed by way of a proffer, I
12 would like to go through about fourteen diary entries,
13 beginning with October 11, 1969, then going to October 16,
14 October 21, two in February, one in April, one in May,
15 one in September, two in October, one in November, one in
16 1970, on January 13; one on February 25, 1970, and one
17 on March 18, 1970.

18 These diary entries, or entries on calendar
19 pads, were made in Mr. deGive's handwriting on calendar
20 pads he had.

21 I am prepared to tell the Court that after a
22 letter was written in February of 1971 to Mr. Thomas S.
23 Carey, assistant compliance director, Dominick &
24 Dominick, 14 Wall Street, by Mr. Kamerman -- and the
25 letter is an inquiry with respect to arranging a

1
2 conference concerning Mrs. Van Alen's trading accounts,
3 the letter was on Mr. Kamerman's legal stationery, and
4 Mr. Carey at Dominick & Dominick knew that Mr. Kamerman
5 was acting as a lawyer in behalf of Mrs. Van Alen and
6 was looking for a conference.

7 Following that, about four months later, Mr.
8 deGive came to Mr. Kamerman's office and presented him
9 with these calendar pads and represented at that time that
10 those calendar pads set forth some evidentiary detail
11 with respect to conversations he claimed to have had with
12 Mrs. Van Alen and her husband, and that based on those
13 calendar notations he was offering as a defense that the
14 things we complain about during the complained-of period
15 with respect to the four churns were as a result of
16 direct conferences with Mr. and Mrs. Van Alen and at
17 their specific instructions as to what to buy or what to
18 sell, when to sell.

19 When it came time much later to take pretrial
20 depositions in this case, my client then contacted the
21 Van Alens and became suspicious of these diary entries,
22 because of the timing of certain claimed conversations
23 that Mr. deGive was offering to Mr. Kamerman as having
24 occurred with Mr. and Mrs. Van Alen.

25 Upon checking with my clients, he then cross-

1 examined Mr. deGive rather extensively in the pretrial
2 record at deposition, and Mr. deGive confessed during
3 the pretrial deposition that these entries were in
4 part fake; that he was making up items and putting them
5 down on these dates, and he offered the lame excuse,
6 which he can have before this Court if he wishes to
7 hold on to that slim reed, that he was trying to jog his
8 memory and therefore was doodling on the pad on these
9 particular dates and doodling certain conversations which
10 he wrote down in an effort to jog his memory.
11

12 We think that this evidence is properly
13 considered by the Court on the basis of false exculpatory
14 explanation; that it is conduct that is inconsistent with
15 his claim here today that whatever he did he did as a
16 result of a system that he had developed and that he
17 applied his system to my client's account during the
18 complained-of period. We think it is very strong
19 information from which the Court can make a determination
20 with respect to not only (1) his credibility, but also
21 the scienter which has to be established by the plaintiffs
22 to prevail on the four counts that are viable before the
23 Court.

24 We think it is a classic case for cross-
25 examination of Mr. deGive as to inconsistent conduct in

1 [773]
2 the past. The inconsistency is established by the fact
3 that he comes to Mr. Kamerman on one day and he presents
4 a certain --

5 THE COURT: Excuse me, counsel. What was the
6 date when this action was commenced?

7 MR. BARIST: December 1971, your Honor.

8 THE COURT: What was the date, Mr. Barist, when
9 your firm --

10 MR. SHAFFER: December 1971, your Honor.

11 THE COURT: -- began to represent Dominick &
12 Dominick? The year will suffice.

13 MR. BARIST: My firm represented Dominick &
14 Dominick for many years prior to 1971.

15 THE COURT: Many years?

16 MR. BARIST: Many years, your Honor.

17 THE COURT: And when did you first represent
18 Mr. deGive in his individual capacity?

19 MR. BARIST: When the complaint was filed,
20 your Honor, we were retained for both Dominick & Dominick
21 and Mr. deGive, as is normal in these situations where
22 you represent both the company and the officer.

23 MR. SHAFFER: I don't know about that.

24 THE COURT: He is being sued in his individual
25 capacity, is he not?

MR. BARIST: That is correct, your Honor.

THE COURT: And that representation occurred, then, on his behalf by your firm in or after December of 1971, Mr. Barist?

MR. BARIST: That is correct, your Honor. I could not swear that we had not done some other legal work for him, but I am not aware of it at this time.

THE COURT: The material we are concerned about here at this point involved matters which were presented, discussed, and so forth, several months prior to your firm actually representing Mr. deGive, Mr. Barist?

MR. BARIST: Yes, sir.

THE COURT: Why, then, should the Court be concerned about the fact that in his dealings with either the Kamerman law firm or the Kamerman accounting firm he did not have present with him an attorney or such arrangements to deal with him were not made to an attorney?

MR. BARIST: I think I see where your Honor is going. I think your Honor is focusing on one branch of the same rule.

THE COURT: Let me deal with that branch first.

MR. BARIST: If I could, your Honor, one branch of the rule says that where you know somebody is

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2 represented by counsel, you don't get in touch with the
3 client without talking to the lawyer. There is another
4 branch of that rule, which is expressed in the rule and
5 in the opinions of the ABA, which are cited in our
6 memorandum, which say that where you don't know that
7 somebody is represented by counsel but you are conducting
8 an investigation, it is incumbent upon you to make it
9 clear to them that you are a lawyer and that you are
10 conducting an investigation on behalf of someone who has
11 an adverse interest.

12 The one thing, I think, which cannot be done is
13 to send somebody a letter on CPA stationery saying, "Come
14 up and talk to me," about what appears to be routine
15 matters, and then use that five years later as somehow
16 an inconsistent statement.

17 Could I point this out, your Honor? First,
18 with respect to what Mr. Shaffer claimed about what Mr.
19 deGive said on that deposition, there is nowhere in that
20 deposition where he confessed.

21 THE COURT: No, no, you are going into the
22 merits of the thing now. Let us not do that.

23 MR. BARIST: I will stick, then, with what
24 concerns your Honor. What I am saying to your Honor, I
25 think it is perfectly clear, is this: I know I have a

1
2 case against Mr. Jones or I think I have a case against
3 Mr. Jones on behalf of Mrs. Schwartz. I don't walk up
4 to Mr. Jones and say, "Hi, would you like to tell me
5 about that automobile accident you had with Mrs. Schwartz,"
6 without saying, "My name is Jeff Barist, I am a lawyer
7 and I am representing Mrs. Schwartz and I have an
8 adverse interest in you."

9 There is a Second Circuit case in the last
10 few months which did not get its way into this memorandum,
11 where an associate, I think it was in one of the large
12 firms, I think it was Royall, Koegel, nearly wound up
13 getting the whole firm in trouble, because he wanted to
14 find out whether or not another company, a prospective
15 defendant, did business in Long Island, so he could sue
16 them there. He called them up and said, "Do you have a
17 Long Island office?" That was criticized.

18 Now here we have a situation where Mr. Kamerman
19 in March of 1971 knows he is investigating something.
20 He does not tell deGive, "deGive, I am a lawyer. deGive,
21 I am a lawyer representing Mrs. Van Alen." He writes him
22 a letter on CPA stationery, and now he wants to use that
23 as a way of somehow blackening my client's name.

24 Kamerman could not even get on the witness
25 stand and testify to that conversation. If he attempted

1
2 to get on the witness stand, the whole case has to be
3 thrown out. Foley V. Vanderbilt in the Second Circuit,
4 which I had the pleasure of arguing or at least appearing
5 on the briefs six months ago, says that if you are going
6 to try a case, which Mr. Kamerman is, you don't appear
7 as a witness.

8 So what if Mr. deGive says, as I expect him to
9 say, as he has testified before, "No, I never made any
10 false representation to Mr. Kamerman," then what? Does
11 Mr. Kamerman take the witness stand and attempt to --

12 THE COURT: I will make the ruling.

13 MR. SHAFFER: Your Honor, before you do, may I
14 be heard?

15 THE COURT: In response?

16 MR. SHAFFER: Yes.

17 THE COURT: All right.

18 MR. SHAFFER: First, by way of a proffer, I
19 would like to indicate that, if permitted, I would prove
20 that Mr. deGive called Mr. Kamerman on December 28, 1970,
21 made a telephone call to Mr. Kamerman, and in which he
22 said in effect that he got instructions from the Van Alens
23 to all of the market transactions with respect to which
24 Mr. Kamerman showed an interest.

25 That is not quote but that is the substance.

1
2 THE COURT: As to the material which relates
3 to the March 25, 1971 letter, which had been previously
4 identified by counsel, I will not permit that evidence
5 to be received. I make that ruling simply under Rule 403.

6 Bring the witness back in and let us proceed.

7 (The March 1971 letter is marked Court's
8 Exhibit 2.)

9 P A U L d e G I V E, resumed.

10 MR. SHAFFER: I did not understand your Honor's
11 ruling. I understand I cannot inquire about the letter.
12 I would like to inquire about the fourteen diary entries.

13 THE COURT: All diary entries which came to the
14 attention of the attorney for the plaintiff at a time
15 when an inquiry was underway which the Court reasonably
16 concludes led to the filing of the lawsuit against Mr.
17 deGive may not be used in the trial for any purpose.
18 Such is the ruling.

19 MR. SHAFFER: Your Honor, before we leave that --
20 and I know it is the ruling -- are you aware of the fact
21 that the letter which you have marked as a Court exhibit
22 is written on legal stationery?

23 THE COURT: I am aware that what I am looking
24 at here, marked Court's 2, dated March 25, 1971, bears
25 letterhead "Kamerman & Kamerman, Certified Public

Accountants."

MR. SHAFFER: Just a second, Judge.

Your Honor, just so you don't make a ruling based upon erroneous facts, may I have another thirty seconds to call some facts to your attention?

THE COURT: Yes.

MR. SHAFFER: Your Honor, I offer to be marked as a Court exhibit this document.

THE COURT: Court's 3.

(Court's Exhibit 3 marked.)

THE COURT: May I see it?

MR. SHAFFER: Yes (handing to the Court).

Your Honor, this letter, I represent -- and I will get confirmation of this, so I am sure in my representation -- was written on legal stationery to Mr. Carey at a time when Mr. deGive, if he had a lawyer we did not know who he was, and it was as a result of that letter that Mr. deGive came into contact with Mr. Kamerman and offered this spurious explanation in an effort to kill the suit. And it was Carey who sent deGive up to Kamerman. I think I can establish that.

As a result of this chain of events, Mr. deGive made the testimony that I have proffered with respect to what the calendar pads were on one occasion.

1
2 Then later, when that information was very suspect in
3 Mr. Kamerman's mind, in pretrial deposition we cross-
4 examined Mr. deGive on that material and found some
5 very interesting disclosures, which we think are
6 appropriately to be considered by your Honor along the
7 lines I mentioned.

8 THE COURT: Let me ask this: Mr. Barist has
9 come prepared with a memorandum of law in support of a
10 position on the offer, which means that he anticipated
11 that the issue would arise; in fact, the memorandum is
12 dated on the last page November 8, 1976.

13 MR. SHAFFER: Right.

14 THE COURT: Am I concluding correctly, Mr.
15 Shaffer, that if he knew the issue was going to arise
16 and this exchange would occur, that plaintiff's attorney
17 similarly knew that it was going to arise during the
18 examination of this witness?

19 MR. SHAFFER: Your Honor, I don't think the
20 standard is what I knew. It is what I would be reasonably
21 expected to know as somebody who has been employed to try
22 a case. But I don't know that simply because somebody trots
23 out the paper that they win the ruling for that reason.

24 THE COURT: No. I just want to --

25 MR. BARIST: May I say something for the record?

1 [781]

2 THE COURT: You may.

3 MR. BARIST: The answer is, they not only knew it,
4 but I will tell you, your Honor, that I had specific
5 conversations within the immediate days before trial with
6 Mr. Jerome Kamerman about this. I informed him that I
7 hoped that this issue would not come up, because I am
8 not happy pointing out what I regard as Mr. Kamerman's
9 breach of the canons in open court; that we had
10 previously agreed to let this thing die.

11 MR. SHAFFER: You did what?

12 MR. BARIST: That I said to Mr. Kamerman that
13 we had previously agreed not to get into a fight about
14 this, I didn't think it did anything for him; I didn't
15 think that his position was fair. He said, "You do what
16 you will." I said, "In that case you know my position
17 and if you go into these things in open court, I am
18 going to have to make my position clear."

19 THE COURT: That is enough. Now let me just
20 conclude the matter by stating on the record that we have
21 been at trial several days now, and in some respects this
22 is perhaps the most serious evidentiary question which
23 has been raised since the trial began. I find it unhelp-
24 ful, extremely unhelpful, to be presented with the issue
25 with serious implications and to have the only memorandum

1 [782]

2 of law on the question submitted by counsel who is opposing
3 the offer.

4 It would have been not merely a courtesy to the
5 Court but helpful on the question itself to have been
6 presented with memoranda of law initially by the
7 attorney making the offer, knowing that there would be
8 opposition when the offer was made, and then to have
9 heard from the attorney opposing the offer and to have
10 had all of this in advance of the issue being raised. We
11 are presumably only an hour or so from the end of the
12 plaintiff's case.

13 MR. SHAFFER: What, Judge?

14 THE COURT: Let me withdraw that and say: from
15 the end of this examination.

16 MR. SHAFFER: Yes.

17 THE COURT: From the end of this examination.

18 MR. SHAFFER: Judge, let me say, if I may --

19 THE COURT: Let me just conclude. Given what
20 has been presented from the floor by way of oral proffer,
21 by way of written response, presented with this in its
22 total context of the movement of this trial, and having
23 in mind my obligation in terms of the administration of
24 time in any trial, I simply rule under 403, without
25 adopting any conclusions as suggested in the written

1 submission, that the evidence may not be presented insofar
2 as it was obtained in the fashion which has been
3 represented here by counsel, and particularly Mr. Barist,
4 but giving consideration to Mr. Shaffer's explanations
5 and representations as well.
6

7 So let us move on.

8 MR. SHAFFER: All right, your Honor. May I
9 say this?

10 THE COURT: Counsel have their exception.

11 MR. SHAFFER: Yes. May I ask this, your Honor,
12 and then I know you have asked me to move on and I will.
13 May I have the opportunity, first, to apologize to the
14 Court for not giving you a written memorandum on the
15 subject.

16 THE COURT: I am not so much concerned about
17 that as I am about the fact that there is evidence being
18 offered which perhaps should have been received and now
19 I find myself in the position of ruling that I should not
20 receive it.

21 MR. SHAFFER: That is my point, your Honor.
22 Since we are engaged in a search for the truth within
23 certain rules and case precedents, I would like an
24 opportunity, your Honor, to prepare a memorandum and at
25 a later time make an application to your discretion to

1 [784] deGive - direct A-591
2 recall Mr. deGive on this point before I rest. You may
3 deny that, but at least --

4 THE COURT: I suppose you are entitled to that,
5 Mr. Shaffer, but not before you rest but rather before
6 the end of the plaintiff's case.

7 MR. SHAFFER: That is what I mean by resting,
8 Judge.

9 THE COURT: All right.

10 MR. SHAFFER: Excuse me. Before the end of
11 my presentation of testimony.

12 THE COURT: All right.

13 MR. SHAFFER: And that does not bind you to
14 grant it at the time that I do present it, but if I
15 present cogent reasons I am sure you will.

16 THE COURT: Yes, you have that opportunity.

17 MR. SHAFFER: Thank you.

18 THE COURT: Now let us move on.

19 BY MR. SHAFFER:

20 Q Mr. deGive, let us go to the subject of rules.
21 Are you aware that the New York Stock Exchange has
22 provided certain rules that apply to you as an account
23 executive?

24 A I am.

25 Q Did they in 1968, '69 and '70? Withdrawn.

2 Did they in 1969 and 1970 have rules obligatory
3 upon you in the conduct of your customers' accounts?

4 A Yes.

5 Q To your knowledge, were there rules upon
6 Dominick & Dominick relating to standards of supervision
7 over you?

8 A Yes.

9 Q Was there a rule in 1969 and 1970 that required
10 that each discretionary order be initialed by a
11 supervisor other than you?

12 MR. BARIST: Objection, your Honor. If he is
13 cross-examining to establish the contents of the rule,
14 that should be done by putting the rule in evidence.

15 MR. SHAFFER: We are not doing that, Judge. I
16 am asking him what he knows. I can only do that by what
17 is in his mind and not by the content of some paper written
18 by the New York Stock Exchange.

19 THE COURT: It would be helpful probably to take
20 it in a logical order. If you offered the rule, then you
21 can proceed next with the inquiry you press.

22 MR. SHAFFER: All right, your Honor, I will do
23 it that way.

24 Your Honor, it is stipulated, as a response to
25 a request for admission of fact in this case, that Rule 342,

1 that Rule 405, and Rule 408, as rules of the New York Stock
2 Exchange, were in existence in the form attached to the
3 request for admission of fact.
4

5 Am I correct on that?

6 MR. BARIST: We stipulated to the written form
7 of the rules as it existed at that time in the document.

8 THE COURT: The stipulation, then, is considered
9 to be a part --

10 MR. SHAFFER: There is a little more, Judge.
11 There is one more thing.

12 THE COURT: All right.

13 MR. SHAFFER: In addition to that, your Honor,
14 there is what is called an MF educational circular
15 No. 252, issued by the New York Stock Exchange under
16 date of December 20, 1968, embodying a resolution on
17 December 19, 1968, which is to be considered in pari
18 materia, your Honor, under Rule 405, 342, and 408.

19 MR. BARIST: With the exception of Mr. Shaffer's
20 characterization of in pari materia or in any respect --

21 MR. SHAFFER: I withdraw it, Judge.

22 MR. BARIST: -- we have stipulated that the
23 plaintiff's exhibit, whatever number it is, represents
24 these rules.

25 MR. SHAFFER: I withdraw it.

[787]

deGive - direct

MR. BARIST: And the educational circular.

Your Honor, to avoid having to interrupt the testimony, I have made my motion known with respect to these rules, and I understood your Honor to overrule me. Unless your Honor would like further argument on this point, I would simply make an objection and have a standing objection.

THE COURT: All right. You have it.

MR. SHAFFER: Your Honor, these are --

THE COURT: This is all Plaintiff's 1?

MR. SHAFFER: It is, your Honor.

THE COURT: Is that for identification?

MR. SHAFFER: It is for identification. But now I am going to offer it, your Honor, and ask it be put in evidence.

THE COURT: There being no objection, Plaintiff's 1 is received.

MR. BARIST: I have an outstanding objection, your Honor.

THE COURT: Well, let me see. What was the stipulation?

MR. BARIST: The stipulation is that these pieces of paper are the rules. I object to them on the grounds that I believe that these rules should not be

part of this case. They are not relevant to the issues.

THE COURT: Given that, they are received.

(Plaintiff's Exhibit 1 received in evidence.)

Q At Dominick & Dominick was there anyone, during the years 1969 and 1970, who supervised your trading of my client's accounts on a discretionary basis?

MR. BARIST: Objection to the form.

MR. SHAFFER: If he knows.

THE COURT: I will allow it.

A Dominick & Dominick had a supervisory division and -- Dominick & Dominick had a supervisory division and an officer in charge of it. I presume that they were supervising my accounts.

Q Page 98.

A At Dominick & Dominick.

Q Page 98.

"Question: Was there anyone at Dominick who supervised your trading accounts in 1968, 1969, or 1970?

"Answer: I don't know."

Did you give that answer to that question when you were deposed on March 9, 1972?

A Yes, I did.

Q Was it true when you gave it?

A It was.

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Q Is it true today?

A After reading through the --

Q Just: Is it true today? -- yes or no, and then
your explanation.

MR. BARIST: Your Honor, in context I don't
think that is a fair question.

MR. SHAFFER: I do, Judge, or I would not have
asked it.

MR. BARIST: He is asked what he knew --

THE COURT: I will allow the question.

Q Is it true today, Mr. deGive, your answer that
I read you out of the book? Yes or no.

MR. BARIST: Objection.

THE COURT: Overruled.

Q Your answer, Mr. deGive?

A Would you repeat that question, please?

MR. SHAFFER: Judge, may I do it, because it
will save time. He is cutting into my hour and fifteen
minutes.

THE COURT: All right.

Q Mr. deGive, back in March of 1972, March 9,
were you asked this question?

"Question: Was there anyone at Dominick who
supervised your trading accounts in 1968, 1969 or 1970?

"Answer: I don't know."

Did you give that answer when you were deposed?

A I did.

Q Was it true when you gave the answer?

A It was.

Q Is it true today, your answer?

A On the basis of what I knew then?

Q Yes.

A Yes.

Q Were you aware in 1969 that there was a rule of the New York Stock Exchange that every order entered on a discretionary basis by a member or employee of a member organization must be identified as discretionary on the order at the time of the entry?

MR. BARIST: Can we have the date of that, please?

MR. SHAFFER: Yes.

Q Were you aware in 1969 that there was a rule of the New York Stock Exchange that every order entered on a discretionary basis by a member or employee of a member organization must be identified as discretionary on the order at the time of entry?

A No.

Q Were you aware in 1969 that there was a rule at

1
2 the New York Stock Exchange that such discretionary
3 accounts should receive frequent appropriate supervisory
4 reviews by a member who is not exercising the discretionary
5 power?

6 A No.

7 Q Were you aware in 1970 that there was a rule of
8 the New York Stock Exchange that every order entered on a
9 discretionary basis by a member or an employee of a
10 member organization must be identified as discretionary
11 on the order at the time of entry?

12 THE COURT: Effective when in 1970?

13 MR. SHAFFER: From January 1, 1970, through
14 December 31, 1970, Judge.

15 MR. BARIST: In that case I object to the question
16 as beyond the time frame. I thought these questions were
17 relating to, Judge --

18 MR. SHAFFER: All right, I will accept his
19 amendment. January 1, 1970, to March 3, 1970.

20 Q Were you aware during that period of time that
21 the New York Stock Exchange had a rule that every order
22 entered on a discretionary basis by a member or employee
23 of a member organization must be identified as
24 discretionary on that order at the time of the entry?

25 A No.

Q Were you aware in 1970, during the period we just defined, January 1 through March 3, that there was a rule of the New York Stock Exchange that discretionary accounts should receive frequent appropriate supervisory reviews by a member who is not exercising the discretionary power?

A No.

Q Did you take any steps in 1969 or 1970, up until March 3, to see that orders you placed for Mrs. Van Alen be initialed or approved before they were entered?

A No.

Q Did you inform anybody at Dominick & Dominick about the discretionary trades you were making for Mrs. Van Alen with respect to the Dominick & Dominick account?

MR. BARIST: Objection to the form.

THE COURT: Overruled.

Q You may answer.

A At the time the account was opened --

Q I did not ask that. I am talking about at the time you were executing orders, in 1969 and 1970, which is several years after the account was opened, from January 1, 1969, through March 3, 1970, did you have conferences with anybody about the trades you were making

1 [793] deGive - direct A-600
2 as you were making the trades for Mrs. Van Alen with
3 respect to the securities purchased or sold in her
4 Dominick account? Yes or no.

5 A I don't recall making.

6 Q Were you asked this question and did you give
7 this answer, or series of answers?

8 MR. SHAFFER: Mr. Barist, page 747.

9 MR. BARIST: I will be with you in a moment.

10 Go ahead, sir.

11 Q Starting on page 746, line 13:

12 "Question: Well, you previously described to me you
13 entered an order. You handed it to the man at a desk who
14 would then submit it for execution. Isn't that right?

15 "Answer: Yes, that is true, yes.

16 "Question: Did you expect that man at the desk to
17 approve it?

18 "Answer: No.

19 "Question: Well, who was supposed to approve it?

20 "Answer: An officer who was reviewing the trading.

21 "Question: Where was that officer when you handed
22 your order to the man at the desk?

23 "Was there an officer present in the room when you
24 handed a Van Alen order to the man at the desk to put it
25 in for execution?

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"Answer: At the order desk?

"Question: Yes.

"Answer: No.

"Question: Did you expect the man at the order desk to take your order to an officer?

"Answer: I assumed it would be taken to the officer.

"Question: Before it was executed, is that correct?

"Answer: At the same time.

"Question: That order would be approved before it was executed, is that correct?

"Answer: At or before.

"Question: Did you assume that the man that you handed the order to knew that the Van Alen was a discretionary account?

"Answer: No. I assumed that the officers of the company knew that the Van Alen was a discretionary account.

"Question: How would the man that you handed the order to know that he had to get it approved?

"Answer: Normally I would tell an officer that I was either buying or selling stocks for Mrs. Van Alen at the time that I was buying or selling stocks.

"Question: That is, you told an officer before you handed the order blank to the man at the order desk, is that correct?

1 [795] deGive - direct A-602
2 "Answer: I might have the orders in my hand or I
3 might be getting ready to write them.

4 "Question: Which officer do you recall having spoken
5 to in 1969 at any time when you were about to hand in a
6 Van Alen order?

7 "Answer: There were several officers. I don't
8 remember which one.

9 "Question: Well, give me the names of the ones
10 you remember.

11 "Answer: I don't remember.

12 "Question: Would it be Mitchell?

13 "Answer: I don't recall having given any orders,
14 shown any orders to Mitchell.

15 "Question: How about Rockefeller?

16 "Answer: I recall talking to Rockefeller about the
17 Van Alen discretionary account.

18 "Question: Do you recall showing him or telling him
19 that you were about to enter an order?

20 "Answer: Not specifically.

21 "Question: Can you recall the name of any officer,
22 any officer that you told you were about to enter an
23 order for Van Alen?

24 "Answer: It is confusing in my mind, the years 1969,
25 '70, '71, '72, and '68 and '69.

"Question: At any time?

"Answer: Because there was a turnover of officers in charge of various divisions in the company.

"Question: How many officers were in charge of your" --

MR. BARIST: That question was objected to and rephrased.

MR. SHAFFER: Thank you.

Q "Question: Was there more than one officer that you asked to approve the Van Alen orders?

"Answer: At one time?

"Question: At one time.

"Answer: No.

"Question: Well, in the period 1969 to 1970, can you give me the name of at least one officer who you think you asked to approve a Van Alen order just before you entered it?

"Answer: I can't be sure.

"Question: You can't be sure of even one?

"Answer: Not one."

Did you give those answers to those questions --

A I did.

Q -- when you were deposed? Were they true when you gave them?

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A Yes.

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Q Are they true today?

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A Yes.

5

6

MR. SHAFFER: Your Honor, I am pleased to say
to Mr. Barist: Your witness.

7

8

9

MR. BARIST: If it is not presumptuous, your
Honor, could I suggest that it might be time to take a
morning recess and give me a chance to look my notes over?

10

THE COURT: We will take a morning recess.

11

MR. BARIST: Thank you, your Honor.

12

(Recess)

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MR. SHAFFER: May it please the Court, I have
spoken to Mr. Barist in the hall, and I told him that in
this brief recess I reviewed my notes and there are three
questions, your Honor, which I overlooked, and I asked him
not to object, but if he does I still ask your Honor,
within the discretion of controlling trials, that you allow
me to do it.

20

MR. BARIST: No objection.

21

THE COURT: Put your two questions.

22

MR. SHAFFER: Thank you.

23

BY MR. SHAFFER:

24

25

Q Mr. deGive, did you ever advise anybody at
Dominick & Dominick about the discretionary power you had

1 to execute purchases and sales in Mrs. Van Alen's accounts
2 at the Bank of New York and the First National City Bank,
3 which were the custody accounts?
4

5 A No.

6 Q Did you get anybody's approval at Dominick &
7 Dominick when you opened the discretionary account at the
8 First National City Bank in 1969?

9 MR. BARIST: Objection to the form "you opened."

10 THE COURT: Sustained.

11 Q Did you get approval from anyone at Dominick &
12 Dominick in October of 1969, at the time the First
13 National City Bank custody account was opened, in which
14 you exercised the power of discretionary control?

15 A No.

16 MR. SHAFFER: I offer to be marked as Plaintiff's
17 Exhibit 11 pages 20 and 108 from the Dominick & Dominick
18 manual in force in 1969 and 1970. It has been marked in
19 pretrial, your Honor.

20 MR. BARIST: May I see it.

21 I assume you are not claiming the underlining,
22 Mr. Shaffer?

23 MR. SHAFFER: No. I offer it in evidence.

24 MR. BARIST: Objected to on the grounds of
25 relevancy. Authenticity has been conceded.

THE COURT: Received.

(Plaintiff's Exhibit 11 received in evidence.)

MR. SHAFFER: Your Honor, I would like to call to your Honor's attention the content on page 20 of the manual, which reads in part: "Company policy toward its registered representative.

"2. Does not permit its salesmen to carry discretionary accounts for other than immediate family members."

Page 108. "Discretionary orders. We do not consider discretionary accounts desirable at Dominick & Dominick, Inc. However, there may be rare cases where a person is acting for a member of his family and where special dispensation has been granted."

Q Is Mrs. Van Alen related to you?

THE COURT: Fix the time of the applicability of this.

MR. SHAFFER: I have represented, your Honor, that it is from a manual that was in force from January 1, 1969, through March 3, 1970, and I believe that has been covered in pretrial material.

THE COURT: All right.

Q Mr. deGive, I was about to ask you: Is my client related to you by blood, to your knowledge?

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A No.

Q Is she related to you by marriage?

A No.

Q She is not a family member?

A No.

Q Did you apply for a special dispensation covering the period January 1, 1969, through March 3, 1970, to maintain a discretionary authority either in the Dominick & Dominick account or in the account at the First National City Bank or the Bank of New York during the period January 1 through March 3?

A No.

Q I also read from page 108:

"All discretionary orders must be approved and signed by an officer of the corporation. Discretionary orders are orders from accounts who have provided the salesman with either limited or full trading authority. A separate file should be maintained in each office to keep copies of all discretionary orders."

MR. SHAFFER: Your Honor, I would like to go to the transcript, page 776.

THE COURT: Of the deposition?

MR. SHAFFER: Yes, your Honor. Of Mr. deGive, and it is on September 4, 1973.

1 [801] deGive - direct - cross A-608
2 Q Mr. deGive, were you asked this question and
3 did you give this answer?

4 "Question: Did you specifically ask anybody at
5 Dominick for permission to act under the power of
6 attorney that Mrs. Van Alen gave you at the First
7 National City Bank?

8 "Answer: First National City Bank?

9 "Question: Yes.

10 "Answer: I don't remember getting specific approval
11 to operate under the power of attorney at the First National
12 City Bank from anyone at Dominick & Dominick.

13 "Question: Were you aware of a policy statement or
14 were you aware of Dominick's policy with respect to the
15 carrying of discretionary accounts for customers?

16 "Answer: In general terms.

17 "Question: And what was the policy that you knew
18 about?

19 "Answer: That Dominick & Dominick would be advised
20 of all discretionary accounts."

21 Thank you. I hope that was three questions.

22 THE COURT: Go ahead, Mr. Barist.

23 CROSS-EXAMINATION

24 BY MR. BARIST:

25 Q Good morning, Mr. deGive. Have you ever

1
2 told Mr. Stout that you had a discretionary power over
3 Mrs. Van Alen's account at Dominick & Dominick?

4 A I did.

5 Q What did you? Will you give me a complete
6 sentence.

7 A I said, "I have her discretionary power over
8 this account."

9 Q This was to Mr. Stout in 1953?

10 A Yes.

11 Q In going to the period 1969 through April 3, 1970,
12 could you tell us, sir, at any time did you believe that
13 you were not following all the applicable rules of the
14 New York Stock Exchange?

15 A I thought I was following all the applicable
16 rules of the New York Stock Exchange.

17 Q Thank you. I gather, sir, from your direct
18 testimony that you went to work for Dominick & Dominick in
19 1949?

20 A I did.

21 Q Let us back up. Before that had you worked for
22 a brokerage firm?

23 A I had.

24 Q What brokerage firm, for what period?

25 A In the fall of 1945 I became the manager of the

1
2 New York office for an investment and brokerage firm
3 called Courts & Co., of Atlanta, Georgia.

4 Q Prior to 1945 had you spent World War II in
5 military service?

6 A I was an officer in the naval reserve from June
7 of '41 until the fall of '45.

8 MR. SHAFFER: I object and move that it be
9 stricken.

10 MR. BARIST: I will link it up.

11 THE COURT: I will allow it.

12 Q Prior to entering military service did you work
13 for a bank?

14 A I did.

15 Q Before that you had graduated from college?

16 A Yes.

17 Q What year? What year did you graduate from
18 college?

19 A Class of 1934.

20 Q What I am driving at is this: When you went to
21 Dominick & Dominick in 1949, you had had four years of
22 experience in the brokerage business, is that correct?

23 A Slightly less than that. From the fall of
24 '45 until January '49.

25 Q Did you go there as a partner or as an employee?

1 [806] deGive - cross A-611
2 A I went there with the understanding I was going
3 to be made a partner.

4 Q When you went there did you go there as a
5 partner or as an employee?

6 A Employee.

7 Q And you went there and wrote a market letter?

8 A Yes.

9 Q Were you one of the guiding lights of Dominick &
10 Dominick by 1953?

11 MR. SHAFFER: Could I have an objection, Judge.

12 MR. BARIST: May I be heard if your Honor
13 wishes.

14 MR. SHAFFER: "Guiding lights."

15 THE COURT: Guiding lights.

16 MR. BARIST: Your Honor, the plaintiff's
17 testimony on her direct examination was that she under-
18 stood in 1953 that Mr. deGive was one of the guiding
19 lights of Dominick & Dominick.

20 THE COURT: Just a moment, please.

21 All right, you may answer.

22 A I felt that I had an important position with
23 Dominick & Dominick.

24 Q Had you been made a partner by 1953?

25 A No.

1 [807] deGive - cross A-612
2 Q You testified that in the mid-1960's, when
3 Dominick & Dominick became a corporation, you received
4 some stock?

5 A Yes.

6 Q You testified you had about 4,000 shares?

7 A To the best of my knowledge, yes.

8 Q Does 4,000 shares represent more than 10 percent,
9 to the best of your knowledge, of the total outstanding
10 capital of Dominick & Dominick?

11 A At that time, no.

12 Q Does it at this time?

13 A No.

14 Q What is the present market value, if any, of
15 the shares of Dominick & Dominick stock you now hold?

16 A Would you repeat that question?

17 Q What is the present market value, if any, of the
18 Dominick & Dominick shares of stock you now hold?

19 A There is no market value.

20 Q Is there any value for the stock? Does the
21 stock have any value, to your knowledge?

22 MR. SHAFFER: I object to that. If there is no
23 market value, your Honor, we have exhausted the area.
24 What are we talking about, sentimental value or what kind
25 of value is he talking about if not market?

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THE COURT: We will see. Overruled.

Q Is there any value to the Dominick & Dominick stock you now hold, sir?

A No.

Q You have been in the brokerage business, then, from 1949 through the present; is that correct?

A Fall of 1945.

Q Fall of 1945 through the present. In that entire period, sir, can you tell us whether or not you have been censured or disciplined by any regulatory agency, such as the National Association of Security Dealers, the New York Stock Exchange, or the Securities and Exchange Commission?

MR. SHAFFER: I object to the form.

MR. BARIST: I will withdraw the question and rephrase it.

Q Have you ever been censured or disciplined by the New York Stock Exchange?

A No.

Q Have you ever been censured or disciplined by the Securities and Exchange Commission?

A No.

Q Have you ever been censured or disciplined by the National Association of Security Dealers?

1
2 A No.

3 Q Have you ever been censured or disciplined by
4 any regulatory body with respect to your business as
5 a broker?

6 A No.

7 Q Sir, you testified on direct examination,
8 cross-examination by Mr. Shaffer, as to your conversations
9 with Mrs. Van Alen in 1953 when she opened the account.

10 During the years that followed 1953 did you have any
11 other conversations with Mrs. Van Alen in which Mrs.
12 Van Alen expressed to you what her desire was with
13 respect to the investments over which you had a trading
14 authority? That is yes or no.

15 A Would you repeat that question.

16 MR. BARIST: Could you read the question, please.

17 (Question read)

18 A Yes.

19 Q What did she say to you with respect to her
20 desire?

21 THE COURT: And when?

22 Q And if you can place it, when?

23 A After Mrs. Van Alen opened a margin account in
24 1963, on more than one occasion after that she expressed
25 the desire to make more money.

1 [810] deGive - cross A-615
2 Q Do you have any recollection of a particular
3 date in that period of 1963 to 1970?

4 MR. SHAFFER: I object.

5 THE COURT: Overruled.

6 MR. SHAFFER: Well, Judge, 1970.

7 Q April 3, 1970.

8 THE COURT: All right.

9 A Yes.

10 Q Give us the best recollection that you have of
11 specific times.

12 A At a meeting we were going over Mrs. Van Alen's
13 tax return for the year 1966 and later the next year,
14 again, for the year 1967, and Mrs. Van Alen showed me the
15 tax return and went into great detail about the
16 deductions as well as the profits that were taken in the
17 account, and said, "Now, Paul, we must make more money."

18 Also in 1967, at review of the tax returns, she said,
19 "I don't see why I can't get more deductions," and showed
20 me a list in the tax return of the deductions that she
21 had taken, and said, "Can't I get more deductions than
22 this?"

23 Q Did Mrs. Van Alen, in the period that you had
24 a trading authority over her accounts, ever indicate to
25 you by what she said that she was following the market,

1 that is, following whether stock prices were going up or
2 down?
3

4 MR. SHAFFER: Your Honor, I object. He can
5 talk about a conversation, give us the exact words or the
6 substance.

7 THE COURT: Sustained.

8 MR. BARIST: I am trying to focus his recollection
9 on a specific area, your Honor, and then I would ask him
10 for his recollection of the substance. Is that
11 permissible, your Honor?

12 THE COURT: All right, go ahead.

13 MR. BARIST: So my first question really is
14 yes or no.

15 THE WITNESS: May I have that question again?

16 Q Let me rephrase it. In the period that you had
17 a trading authority -- let us talk about the period
18 after 1963, 1963 to April 3, 1970 -- did you ever have
19 any conversations with Mrs. Van Alen in which Mrs. Van Alen
20 stated words which led you to understand that she was
21 following the market, the price action of the market,
22 whether stock prices were going up or down?

23 A Yes.

24 Q Do you recall any such conversation?

25 A On more than one occasion I recall --

MR. SHAFFER: I object. The answer is yes or no, and then I would like to fix a time and a place, Judge.

THE COURT: All right.

Q The answer is yes or no.

A Would you repeat that question please.

(Question read)

A Yes.

Q Do you recall a specific time and place of such a conversation?

A I recall in late 1966 and again in 1967.

MR. SHAFFER: Could we have them separate, Judge?

Q Give us what you recall about the late 1966 conversation and give us, to the best of your recollection, the circumstances of the conversation and what you recall was said by Mrs. Van Alen or Mr. Van Alen or both.

A Some time in November or December of 1966 I recall Mrs. Van Alen having a conversation with Mr. Van Alen, and she said, "I see you -- our stocks are doing very well and the market is going up." And she named specific stocks that she was holding to say, "Well, those are doing well," and then asked me about one or two other stocks that had not gone up very much. And she said, "What's wrong with them?"

Q Was anybody else present at that conversation

1 if you recall?

2 A Mr. Van Alen.

3 Q What did Mr. Van Alen say, to your recollection?

4 A He said, "Why can't we buy some more stocks that
5 are going up?"

6 Q Do you remember any other conversations, sir?

7 A In 1967.

8 Q What do you recollect about that as to when it
9 was, where it was, and who was there, and what was said,
10 if you do have any such specific recollection?

11 A I recall from time to time in '67 talking with
12 the Van Alens and --

13 MR. SHAFFER: I object. Judge, we don't want
14 wholesale "from time to time." We want each conversation
15 that this man says he has a recollection of, so we can
16 effectively hear and his testimony will be probative.

17 MR. BARIST: Your Honor, I object to --

18 THE COURT: Sustained, sustained.

19 MR. BARIST: May I be heard, your Honor?

20 THE COURT: Do the best you can on that.

21 Q Mr. deGive, do you have a recollection of a
22 specific datum of a conversation or have these conversa-
23 tions over the years blended into one?

24 A I have had a number of conversations with Mrs.
25

Van Alen over a period of years.

Q Can you place those conversations back in 1965, '66, '67, by exact times and places?

MR. SHAFFER: I object, your Honor.

A No.

MR. SHAFFER: He has already told us two specific conversations he had in late 1966 in November and December. He gave us a fixed time.

THE COURT: Sustained.

Q In addition to the one in October-November 1966, do you have a specific recollection --

THE COURT: That was November-December.

Q -- November-December of 1966, do you have a recollection of any other specific conversation as opposed to conversations which you cannot place in terms of the exact time and date?

MR. SHAFFER: I object to the form of the question.

THE COURT: Yes, sustained.

Mr. deGive, I gather you were about to tell us that you had some conversations with the plaintiff in 1967. When for the first time do you recall having conversation which, I gather, is expected to be on the order of what you talked about in November-December 1966?

Do you recall when in 1967?

THE WITNESS: Your Honor, it was my practice to --

THE COURT: The answer is yes, no, or "I don't recall" or "I can't remember."

THE WITNESS: I don't remember any specific.

THE COURT: All right. Go ahead.

MR. BARIST: Your Honor, since he cannot remember it specifically, I will then ask him what he recollects of any conversations with Mrs. Van Alen with respect to her following of the stock market.

MR. SHAFFER: I object, your Honor. It is valueless testimony. He cannot give a time and place. You may want to receive it for what weight you care to give it, but I think that it is improper testimony with respect to conversations. We don't take them wholesale. They come on a retail basis.

THE COURT: Mr. deGive, do you remember having conversations with the plaintiff in 1967 at all, about these matters?

THE WITNESS: Your Honor, I had frequent conversations with Mrs. Van Alen in 1967.

THE COURT: Then the answer is yes.

THE WITNESS: Yes.

[816]

deGive - cross

THE COURT: Go ahead.

Q Do you remember if in 1967 Mrs. Van Alen ever said anything with respect to her following the stock market?

A In 1967 and other years.

Q What do you recollect, sir?

THE COURT: We are going to limit ourselves to 1967, if possible, only because that was his earlier answer.

Q In 1967 what do you recall?

A I recall that in 1967, at a conversation, more than one, with Mrs. Van Alen, she said, "The market is doing just beautiful and we are making money," and then she would talk about stocks which had gone up very nicely and say, "Well, now, why do we have to own this stock, because it's not doing anything? Can't we sell it and buy another stock that is moving or going up?"

Q Over the years did you have other conversations with Mrs. Van Alen of like import?

MR. SHAFFER: I object.

THE COURT: Of what?

MR. SHAFFER: I object.

Q Did you have similar conversations --

MR. SHAFFER: I object, I object.

THE COURT: Sustained.

Q In 1963, Mr. deGive, you testified on direct examination that Mrs. Van Alen opened a margin account with respect to her account at Dominick & Dominick.

A Yes.

Q Sir, at the time that she opened her margin account, could you tell us whether or not you told her she was opening up a margin account?

A I did.

Q What did you tell her?

A I told Mrs. Van Alen that if she wanted to open a margin account it would be necessary to sign the papers prescribed, custody agreement. And I told her that then she would borrow money or be borrowing money from Dominick & Dominick, and Dominick & Dominick would charge her an interest charge. And also that that interest charge was deductible for income tax purposes.

I then asked her to read the agreement carefully before she signed it, and she did.

MR. BARIST: Your Honor, with your Honor's permission, I would like to make reference at this point to read just two words from Defendants' Exhibit 16 in evidence, which is the Dominick & Dominick statement which plaintiff has stipulated was sent to Mrs. Van Alen.

1
2 If your Honor would, the very top line of each one of the
3 monthly statements for the periods involved have at the
4 top the two words "Margin Account."

5 MR. SHAFFER: Judge, I concede that.

6 THE COURT: All right.

7 Q During the period 1953 to 1968, at the close of
8 calendar 1968, did Mrs. Van Alen ever tell you that any
9 securities transactions you made were not in accord with
10 her investment intent?

11 A No.

12 Q Did she ever tell you not to take short-term
13 profits or losses?

14 A No.

15 Q Did Mrs. Van Alen ever make recommendations to
16 you with respect to the purchase of individual securities?

17 A Yes.

18 Q Do you recollect any particular such instance?

19 A I do.

20 Q Tell us about it, sir.

21 A I remember at one time Mrs. Van Alen called me
22 on the phone and said, "Paul, I want you to buy this
23 stock," and I said --

24 MR. SHAFFER: Could we have a time and place,
25 Judge.

1

2

THE COURT: Yes.

3

Q Do you recollect the time and the place, Mr.

4

deGive?

5

A I recollect the telephone call.

6

Q Do you recollect the date of it?

7

A I do not.

8

THE COURT: Month, year, season, decade.

9

Q Was it in the 1960's?

10

A After 1963.

11

Q It was after 1963.

12

A Yes.

13

MR. BARIST: Could he go on, sir, with his

14

recollection?

15

MR. SHAFFER: Now do I understand this is

16

some time between 1963, Judge, and March 3, 1970?

17

Is that the parameters of it?

18

THE COURT: Well, Mr. Barist?

19

Q Could you go on, sir, with your recollection.

20

THE COURT: No, no.

21

MR. SHAFFER: The time.

22

THE COURT: No, let us see if the parameters are

23

indeed that broad.

24

Q Can you recall whether this was in the mid-

25

Sixties, the late Sixties, or what-have-you, with respect

1 to this telephone call.

2
3 A It would have been prior -- it was some time
4 between 1963 and 1968.

5 Q Now could I have your recollection as to the
6 telephone conversation, sir.

7 A She called me and she said, "Paul, I want you
8 to buy some of this stock." And I said, "I don't think I
9 know it too well. Why?" And she said, "It has been
10 recommended to me by someone at a party that I attended
11 last night, and they tell me the stock is going to go
12 up very -- go up quickly, but if you buy it, sell me out
13 before it goes down."

14 Q What did you do with respect to that stock?

15 A I told Mrs. Van Alen that I did not know
16 anything -- that I knew very little about the company,
17 and in my judgment it was not suitable for her.

18 Q Did you buy the stock?

19 A I did not.

20 Q Do you remember Mr. Shaffer asked you questions
21 about the First National City Bank loan that occurred in
22 October 1969?

23 A Yes.

24 Q Do you remember that, sir?

25 A Yes, I do.

Q Prior to 1969, do you remember if Mrs. Van Alen had previously taken out loans with which to purchase securities?

A Prior to that date?

Q Yes.

A Yes.

Q Let me show you what has been marked Defendants' 31E for identification, the authenticity of which has been stipulated to, and for the record it is from the Bank of New York.

THE COURT: It would be helpful if documents are identified as plaintiff's or defendants'.

MR. BARIST: Excuse me. Defendants' 31E for identification, your Honor.

THE COURT: Defendants' 31E for identification.

Q Do you recognize Mrs. Van Alen's signature on the second page of that document?

A I do.

MR. BARIST: I offer it in evidence, your Honor.

MR. SHAFFER: Could I see it?

MR. BARIST: You stipulated to authenticity.

MR. SHAFFER: No objection, Judge.

THE COURT: Received.

(Defendants' Exhibit 31E received in evidence.)

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Q In 1967 did Mrs. Van Alen, to your recollection, take out a \$300,000 loan with which to purchase securities?

A In '67?

Q In 1967. Look at Exhibit 31E for identification if you need to refresh your recollection.

A Is this the exhibit you are referring to?

Q Yes. Excuse me. 1968. I withdraw the question.

In 1968 did Mrs. Van Alen take out a \$300,000 loan with which to purchase securities?

A Yes.

Q Going back in time from, let us say, 1963 through 1968, was there ever a time, to your recollection, when Mrs. Van Alen had not taken out a loan with which to purchase securities, a loan being a loan from a bank?

MR. SHAFFER: I object to the form of that question. Implicit in the question, Judge, is that, you know, she lived at a bank and kept taking out a bank loan each day.

THE COURT: All right, reframe it.

Q Mr. deGive, to the best of your recollection, can you tell us what you remember about Mrs. Van Alen's taking out loans from a bank with which to purchase the securities in the period 1963 through 1968.

1
2 A I remember that she had loans at the bank from
3 1963 through 1968, of varying amounts.

4 Q Were these loans used to purchase securities?

5 A In the main, yes.

6 Q I believe, Mr. deGive, that you testified on
7 your direct examination that in 1953, to the best of your
8 recollection, the account at the Empire Trust was worth
9 less than \$100,000 and the account at Dominick &
10 Dominick was worth around \$25,000? Do you recollect that
11 testimony you gave on your cross-examination by Mr.
12 Shaffer?

13 A The account at Dominick & Dominick was in the
14 \$25,000-\$30,000 area, and the other one was below a
15 hundred, to the best of my recollection.

16 Q I am going to ask you very specifically now,
17 because Mr. Shaffer wants specifics: Do you remember
18 down to rounding to \$5,000 what the account was worth
19 on January 1, 1965, December 31, 1965, December 1, 1966,
20 December 31, 1966, December 31, 1967, or December 31,
21 1968?

22 MR. SHAFFER: Your Honor, I object for relevance.
23 They want to show during this period of time that Mr.
24 deGive made money for Mrs. Van Alen, and we concede that.

25 THE COURT: Overruled.

2 Q Do you recollect those specific numbers, sir?

3 A I don't recollect the specific numbers.

4 Q Do you remember signing something called
5 "Answers to Interrogatories" in this case?

6 A I do.

7 Q Written questions?

8 A Yes.

9 Q Let me put in front of you, sir, to ask you to
10 refresh your recollection --

11 MR. SHAFFER: Is it marked?

12 MR. BARIST: It is the answers to interrogatories
13 sworn to February 14, 1974, by Mr. deGive.

14 MR. SHAFFER: I object unless it is marked.

15 THE COURT: Mark it.

16 MR. BARIST: What is our next number?

17 MR. FITZPATRICK: 239.

18 THE COURT: 239 for identification, Defendants'.

XXX

19 (Defendants' Exhibit 239 marked for
20 identification.)

21 Q Let me show you Defendants' Exhibit 239 for
22 identification and ask you if, with this document in
23 front of you, you can tell me, sir, as of January 1 --

24 MR. BARIST: With your Honor's permission I
25 would like to keep track of these on a blackboard because

I think we will be using them later on.

Q -- as of January 1, 1965, what was the account at Dominick & Dominick worth?

A \$130,000.

Q And as of December 31, 1965, what was the account worth?

A \$190,000.

Q December 31, 1966.

A \$280,000.

Q December 31, 1967.

A \$510,000.

Q December 31, 1968.

A \$360,000.

Q Sir, will you turn to page 2. I ask you, if you can tell me, sir, what was the account at the Bank of New York worth on December 31, 1965?

A \$940,000.

Q And on December 31, 1966.

A \$1,060,000.

Q And at December 31, 1967.

A \$1,350,000.

Q 360 or 350?

A 360.

Q And on December 31, 1968.

1
2 A \$1,350,000.

3 MR. BARIST: With your Honor's permission, I
4 will take off the January 1, 1965 figure from the
5 blackboard, since it just makes it confusing.

6 Q Mr. deGive, adding the two numbers in our head,
7 on December 31, 1968, Mrs. Van Alen's account was worth
8 in excess of -- two accounts -- in excess of \$1,700,000,
9 is that correct?

10 A That's correct.

11 Q In making investment decisions for Mrs. Van Alen,
12 in trading, making -- withdraw that.

13 In making your decisions in 1969 through April 3,
14 1970, with respect to the securities you purchased and
15 sold for Mrs. Van Alen, did you take into consideration
16 the fact that her total account over which you had
17 authority was worth in excess of \$1,700,000?

18 A I did.

19 Q Would it be fair to say, sir, that a transaction
20 which might be too much for someone with \$10,000 is not
21 too much for someone with \$1,700,000, in the way you
22 approached the exercise of your trading authority?

23 MR. SHAFFER: Your Honor, I object. Your Honor,
24 I would like a rule from you as to whether or not Mr.
25 Barist is permitted to lead at this point.

MR. BARIST: I will rephrase it, because I can see your Honor's problem in terms of "for whatever it is worth."

Q Do you recollect what you made in 1968 from commissions from Mrs. Van Alen's account at Dominick & Dominick, and the Bank of New York, the two accounts together, what did you make in the way of commissions, 1968?

MR. SHAFFER: Could we have that cleared up? By him personally or Dominick & Dominick, his one-third share?

Q Him personally. His one-third share. What came through Paul deGive in the way of commissions from the trades made for Mrs. Van Alen in both accounts in 1968, for the year 1968.

A I remember it was around \$14,000.

Q Do you recollect what you made, you, deGive, made in the way of commissions from Mrs. Van Alen's account at Dominick & Dominick and from the Bank of New York for the year 1969?

A Including the First National City?

Q Yes. Bank of New York, First National City, any, you know, the accounts that we have been testifying about.

2 A I remember it was around \$18,000.

3 Q Tell me, had anything happened to you in --
4 withdraw that.

5 So that the difference between what you made in
6 1968 and what you made in 1969 from Mrs. Van Alen's
7 account was approximately \$4,000?

8 A It was approximately \$4,000.

9 Q Anything happen to you in 1969 which made you
10 need \$4,000?

11 MR. SHAFFER: Oh, Judge, I object to that. I
12 don't think that that is probative.

13 MR. BARIST: I think it goes right to the
14 question of motive.

15 MR. SHAFFER: The form of the question.

16 THE COURT: Just a moment, please. I think we
17 do have a problem with form.

18 MR. BARIST: All right.

19 Q Could you tell us what happened to your financial
20 position in 1969? Was it better or worse or the same in
21 1968?

22 A In 1969 it was better than it was in 1968, my
23 financial condition.

24 Q Why?

25 A My wife had inherited sums of money from 1965

up to 1969, and her net worth --

MR. SHAFFER: I object, your Honor.

A -- had increased substantially, in my opinion.

MR. SHAFFER: I object to it.

THE COURT: I will allow it.

Q What about children? Did you have any responsibilities for children, more or less responsibilities for children or the payments in connection with children in 1969 than you had in prior years?

A In 1969, two of my three sons and two daughters graduated from college or business school, reducing my educational fees by more than \$10,000 of hard dollars before taxes.

Q Let us go back to what you knew about Mrs. Van Alen or Mr. Van Alen. Did you know anything in 1969, for the year January 1, 1969, through April 3, 1970, about the wealth of Mr. Van Alen, if anything? Did you know anything?

MR. SHAFFER: I object, your Honor.

THE COURT: Just a moment, please.

MR. SHAFFER: I would like to state my grounds.

THE COURT: Just a moment, please.

MR. BARIST: They opened this up on cross.

THE COURT: One moment, please, if I may.

(Question read)

MR. SHAFFER: I object.

THE COURT: What is your objection?

MR. SHAFFER: The objection is that this case does not relate to Mr. Van Alen's wealth; it relates to Mrs. Van Alen's wealth. We have made that objection throughout.

MR. BARIST: And again I will make the observation, your Honor --

MR. SHAFFER: You have ruled on it.

THE COURT: I may have ruled on it on the plaintiff's case, but I have not ruled on it on Mr. Barist's. Objection is overruled.

Q Mr. deGive, tell us what you knew about Mr. Van Alen's wealth, if anything.

A When?

Q The period 1969 to 1970. Do you know anything about his ancestry?

A I did.

Q What?

THE COURT: Just a moment. Let me state some limitations on this.

I am assuming that this is being offered, since it follows some other questions just put to the witness

bearing on his state of affairs, bearing on his, more importantly, view or understanding of the plaintiff as a customer, and bearing on the question of whether he was carrying out her wishes, and so forth.

MR. BARIST: Correct.

THE COURT: So it is being received only for background purposes and in a very limited way. You have got to keep it very tight, Mr. Barist.

Q In that case I will ask you: What did you know about Mr. Van Alen's financial position in 1969-1970?

A I knew that Mr. Van Alen had a custody account at a bank in excess of \$500,000 representing securities.

Q When you say a custody account, you mean his personally or the trust or what? I just want to clear that up.

A His personally.

Q Go on.

THE COURT: In 19 what?

MR. SHAFFER: 1969 to '70.

MR. BARIST: '69 to '70.

A I knew that Mr. Van Alen had a life interest in more than one trust. I also knew that Mr. Van Alen was going to inherit from time to time sums of money from various relatives of the Vanderbilt and Astor connections

and that he would inherit those funds outright.

I also knew that Mr. Van Alen was beneficiary of his mother's estate, Madame Labrugiere, who lived in Newport in a substantial way, and that he would inherit those funds outright.

I also knew that Mr. Van Alen had a place on Long Island in excess of ten acres across from the Post College, which he told me was worth in excess of a million dollars.

I also knew that between Mr. and Mrs. Van Alen they owned two houses in Newport, the second house having been purchased to protect the view of the first house.

I also knew that Mr. Van Alen at one time or still had a shooting preserve in Millbrook, New York.

I also knew that Mrs. Van Alen or Mr. Van Alen jointly owned a cooperative apartment on Fifth Avenue.

And I knew that Mr. Van Alen had a substantial income. The tax bracket was over 60 percent for them jointly.

Q Mr. deGive, let me show you what has been marked as Defendants' Exhibit 84 for identification. I ask you if you received that letter some time in April of 1953.

A I did.

MR. BARIST: I offer it in evidence, your Honor.

Authenticity has been stipulated to.

MR. SHAFFER: May I have a moment, your Honor?

THE COURT: All right.

MR. SHAFFER: No objection for the limited purpose that your Honor indicated you were receiving this line of testimony.

MR. BARIST: No problem.

MR. SHAFFER: What number are you going to give it?

MR. BARIST: The number that is stapled on it, 84 in evidence, if his Honor receives it.

Defendants' Exhibit 84 for identification is being offered, for the record.

THE COURT: So that is now offered and there is no objection and it is received. It is offered for that same limited purpose.

MR. BARIST: Right.

(Defendants' Exhibit 84 received in evidence.)

MR. BARIST: If I could, your Honor, let me just read to you from a separate paragraph. Letter dated 9 April 1963, on stationery of Olin, Murphy & Redmond, 120 Broadway, signed by Gordon S. Murphy, and addressed to Mr. Paul deGive at Dominick & Dominick.

Third paragraph:

1
2 "You also inquired of me as to the tax bracket
3 that Mr. and Mrs. Van Alen fall into for tax purposes.
4 On the basis of the 1952 income tax return when filing
5 a joint tax return, Mr. and Mrs. Van Alen in the top
6 bracket of their income are taxed at the 62 percent rate.
7 As I told you before, this is rather a flexible matter
8 and a change, which I expect to take place this year,
9 may bring them up to the 66 percent bracket or even
10 higher."

11 Q Who is Mr. Gordon Murphy, Mr. deGive?

12 A Mrs. Van Alen told me that Mr. Gordon Murphy
13 was her lawyer and prepared tax returns.

14 Q Throughout the period that you had Mrs. Van Alen's
15 trading authority, from 1953 through April 3, 1970, did
16 you know whether or not confirmations or copies of
17 confirmations and monthly statements were being sent to
18 Mrs. Van Alen's lawyer, whoever that lawyer might be at
19 that period?

20 A Yes. I did know that confirmations were being
21 sent.

22 Q To Mrs. Van Alen's lawyer?

23 A Yes, to Mrs. Van Alen's lawyer.

24 Q In the years after 1953, did either Mrs.
25 Van Alen or Mr. Van Alen ever have any discussions with

2 you as to what Mrs. Van Alen would take under Mr.
3 Van Alen's will?

4 A Yes.

5 Q To the best of your recollection, sir, what
6 was said?

7 THE COURT: The year again, please?

8 Q Do you remember the year in which these
9 conversations took place? Do you remember, sir?

10 A It was about the time the account was opened
11 in 1953.

12 Q What was said at that time?

13 A Mr. Van Alen told me that his wife Candace
14 Van Alen was main beneficiary under his estate. He told
15 me that his two sons were taken care of already by
16 previous trusts and/or assignments, and that Mrs.
17 Van Alen was his principal or sole beneficiary of his
18 estate.

19 Q Did Mr. and Mrs. Van Alen ever tell you anything
20 about any arrangement with Mr. Van Alen's first wife?

21 A Mr. Van Alen told me that Mrs. Van Alen --

22 Q Which Mrs. Van Alen?

23 A The first Mrs. Van Alen had taken care of his
24 sons, their mutual sons, as well.

25 MR. BARIST: Your Honor, I am going to take a

1 [837A]

A-641

2 new area. Would this be an appropriate time to take a
3 luncheon recess?

4 THE COURT: Yes. Let us take the recess now.
5 We will resume at 1:45. Step down, please.

6 (Luncheon recess)
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1 [838]

deGive - cross

A-642

2 AFTERNOON SESSION

3 1:50 p.m.

4 P A U L d e G I V E, resumed.

5 CROSS-EXAMINATION (continued)

6 BY MR. BARIST:

7 Q Mr. deGive, let me show you Plaintiff's
8 Exhibit 211 and ask you if you can identify that document.

9 A Yes, I can.

10 Q Is that your handwriting?

11 A It is, or under my direction.

12 Q Does that relate to the technical system which
13 you have been testifying to on your cross-examination?

14 A It does.

15 MR. BARIST: I offer Defendants' 211 in
16 evidence, your Honor, the notebook in Mr. deGive's
17 handwriting.

18 THE COURT: Any objection?

19 MR. SHAFFER: Does it relate to the years 1969
20 and 1970?

21 MR. BARIST: It goes back to prior years and
22 the years 1969-70.

23 MR. SHAFFER: No objection, your Honor.

24 THE COURT: Received.

25 (Defendants' Exhibit 211 received in evidence.)

XXX

MR. BARIST: May I ask this question of the witness:

Q Mr. deGive, did you have these charts from 1933, these Lowry charts, from 1933 through 1966 at the time that you were making investment decisions in regard to Mrs. Van Alen in the years 1969 and 1970?

A I did.

Q Do the years of these charts -- had you studied these charts over these years?

A Yes.

Q And had those charts gone into your understanding of what you referred to as a technical approach, a technical investment approach to the market?

A Yes.

MR. BARIST: I offer them all in evidence, your Honor.

THE COURT: Oh, I will take them from 19 -- given the objection, I will take them from '53 through '66, there being no objection.

MR. BARIST: Thank you, your Honor.

THE COURT: What is the marking on that that results from that?

MR. BARIST: Give me a second to find the exhibit list. I had these lumped together, your Honor,

documents through the testimony of the witness if possible.

THE COURT: Go ahead.

Q Mr. deGive, when you purchased securities for Mrs. Van Alen's accounts in the period of early February 1969, what did you do with respect to the account of Mrs. Eleanor deGive?

A I purchased securities.

Q When you sold securities a week later for Mrs. Candace Van Alen, what did you do for Mrs. Eleanor deGive?

A I sold --

MR. SHAFFER: Your Honor, excuse me. Is this when, meaning on the same date? Is that what you are talking about? If not, I want the question clarified, because sometimes we are a week apart, Judge, and I don't want the "when" to include both transactions.

MR. BARIST: I don't believe they are, Mr. Shaffer. You have the charts as well as I have.

THE COURT: Let us avoid the colloquy among counsel.

Would you start over on the line of questioning.

Q When you sold --

THE COURT: Strike the last question and answer. You were dealing with the purchase first.

Q You purchased securities the Mrs. Van Alen on

1 [856] deGive - cross A-645
2 approximately February 11 through 14, 1969. What did
3 you do for Mrs. deGive in that period?

4 A I purchased securities for Mrs. deGive from
5 February 11.

6 Q You sold securities for Mrs. Van Alen on
7 February 18, the same securities you had bought on
8 February 11. What did you do for Mrs. deGive on or
9 about February 17-18, 1969?

10 A I sold securities for Mrs. deGive on or about
11 February 17-18.

12 Q Were these the same securities that you had
13 purchased for Mrs. deGive approximately one week earlier?

14 A Yes.

15 Q You purchased securities for Mrs. Van Alen on
16 or about April 30, 1969. What did you do for Mrs. deGive
17 on April 29 and April 30, 1969?

18 A I purchased securities for Mrs. deGive starting
19 April 29.

20 Q The securities that were purchased for Mrs.
21 Van Alen were sold on or about May 26 and May 27, 1969 --
22 let me rephrase that question.

23 A I didn't answer your first question. May I
24 have the first question repeated?

25 Q I thought you had. I am phrasing the question

now. Let me rephrase it.

The securities you purchased for Mrs. Van Alen on or about April 30, 1969, were sold by you on or about May 26 and May 27, 1969.

With respect to Mrs. deGive, when did you sell the securities that you had purchased at the end of April for Mrs. deGive?

MR. SHAFFER: He is reading from an exhibit, your Honor, and the exhibit speaks for itself.

THE COURT: Overruled.

A I sold securities for Mrs. deGive starting May 22.

Q Did you sell securities for her on May 27, 1969?

A Yes, April 26.

Q May 26?

A Excuse me, May 26 and May 27.

Q Thank you. You purchased securities from Mrs. Van Alen in the period October 14 through October 29, 1969. Will you tell us, did you purchase securities for Mrs. deGive in October 1969?

I am going to show you what was Plaintiff's 63 in evidence and ask you if this will show that you purchased securities for Mrs. deGive in 1969.

A I did.

MR. EARIST: What is the Eleanor deGive

chronological?

MR. SHAFFER: It is Plaintiff's 63.

Q You purchased securities for Mrs. Van Alen or about December 29, 1970. What did you do for Mrs. deGive on or about that same period? Excuse me, on or about December 29, 1969.

A I purchased securities for Mrs. deGive on December 29, 1969.

Q You purchased securities for Mrs. Van Alen on or about March 2, 1970?

MR. SHAFFER: Your Honor, so we can follow this evidence, is there an analog for Mrs. deGive that is other than Defendants' 93B in evidence which shows the year 1969 transactions which you are now inquiring about? If there is, what is the number, so I can follow you?

MR. BARIST: Yes. Plaintiff's 63.

MR. SHAFFER: That is the one I gave you.

MR. BARIST: Yes, it is the one I just gave to the witness.

Q What did you do for Mrs. deGive with respect to the end of February, beginning of March, 1970?

A I purchased securities for Mrs. deGive.

MR. SHAFFER: Your Honor, I think I can be helpful to the Court by asking a question with respect to

me, as long as we use up time until the end of the day.

MR. SHAFFER: I will wait a few minutes.

(Defendants' Exhibit 116 received in evidence.)

Q Mr. deGive, the record has established --

MR. SHAFFER: I object to that.

MR. BARIST: Excuse me, Mr. Shaffer. I apologize to your Honor. Your Honor, I think I have the right to get a question out before Mr. Shaffer interrupts me, and I think I am trying to establish just foundation question, and I assure you my question is not going to be in any way inadmissible; I don't think.

MR. SHAFFER: I object to his telling the witness what the record establishes, Judge, because we might have a reasonable disagreement on that, and I think I am within my rights and I press the objection.

THE COURT: Excuse me a moment.

Mr. deGive, directing your attention to your earlier testimony concerning -- what?

MR. BARIST: If I could, your Honor, let me rephrase the question this way:

Q Directing your attention to Plaintiff's Exhibit 2 in evidence, which establishes that you purchased securities on approximately February 11 or 12, 1969, and sold them approximately one week later for Mrs. Van Alen,

2 you recollect that purchase and sale within one week of
3 February 1969 as Plaintiff's Exhibit 2 in evidence.

4 A I do.

5 Q My question is: Did you have any conversation
6 with Mrs. Van Alen about that purchase followed by a sale
7 a week later?

8 A Yes.

9 Q When, to the best of your recollection?

10 A To the best of my recollection, I had a
11 conversation with Mrs. Van Alen in the first part of
12 February.

13 Q I did not ask you that. I asked you if you had
14 a conversation with her about the purchase or sale, the
15 purchase followed by the sale. Did you have such a
16 conversation?

17 A Yes.

18 Q When, to the best of your recollection?

19 A It was at or about that time. I first had a
20 conversation with her about the time I was making the
21 purchases, at or about the time.

22 Q I am sorry, Mr. deGive. I have a very simple
23 question. I asked you if you had a conversation with her
24 about the purchase followed by the sale, and you
25 answered yes. I want to know: When did you have the

1 conversation with her about the purchase followed by the
2 sale?
3

4 MR. SHAFFER: I object to the form of the
5 question, your Honor. He is arguing with the witness.

6 THE COURT: Overruled.

7 You may answer.

8 A I remember having a conversation with Mrs.
9 Van Alen around the sale.

10 Q Where did that conversation take place, to the
11 best of your recollection?

12 A It was at a meeting.

13 Q Was it a meeting at the Westbury Hotel?

14 A Yes.

15 Q To the best of your recollection, will you tell
16 us what you said and -- withdraw that.

17 Was Mr. Van Alen at this meeting, this breakfast
18 meeting at the Westbury Hotel?

19 A He was.

20 Q To the best of your recollection, can you tell
21 us who said what at that meeting.

22 A To the best of my recollection, I told Mrs.
23 Van Alen that I had made a mistake, and I'd rather sell
24 securities now than take more loss later.

25 Q Do you remember if you sold the securities, all

1 the securities for Mrs. Van Alen at that time, at the
2 time of that meeting?

3 A I do not.

4 Q What did Mrs. Van Alen say if anything?

5 A She said, "Paul, if that's the way you feel,
6 all right."

7 Q Anything else that you recall?

8 A No.

9 Q Jumping ahead, jumping in time, a year, do you
10 remember receiving a phone call -- you have given
11 testimony with respect to a phone call you received from
12 Mrs. Van Alen in late January 1970. Do you recollect that
13 testimony you gave, sir?

14 A I do.

15 Q Drawing your attention to that testimony, to
16 that telephone conversation, did Mrs. Van Alen at that
17 time tell you anything about other people advising her
18 to get out of the market?

19 A She did.

20 Q Had you previously some weeks before -- I
21 believe you testified, Mr. deGive, that approximately
22 two weeks before you had told Mrs. Van Alen that you were
23 also recommending getting out of the market at that time;
24 is that correct?
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A I did.

Q In the telephone conversation that you had with Mrs. Van Alen at the end of January 1970, did Mrs. Van Alen tell you who ~~she was relying on~~ for her decision to get out of the market, you or the people she had been talking to down in South Carolina?

A She told me that she and Jimmy were out of the city and somewhere down South and that she had been talking to some very important people in the financial world, and that they were quite concerned. And then she said, "Paul, get me out of the market."

Q Did she make any reference at all to your prior conversation with her a couple of weeks before?

A She did not.

THE COURT: When did that conversation take place, again?

MR. BARIST: That is the end of January 1970, your Honor. There has been unanimous testimony as to that. There is no conflict in the testimony as to that date, your Honor. Mrs. Van Alen so testified.

THE COURT: Thank you. Please continue.

Q Drawing your attention to the purchases you made at the beginning of March, 1970, so the record reflects -- now, what I want to know, Mr. deGive -- you

1 don't have to look at that, Mr. deGive -- what I want to
2 know is: Before you made those purchases did you have
3 any conversation with Mrs. Van Alen about those purchases?
4

5 A To the best of my recollection, I did.

6 Q When and where and who said what?

7 A I recall talking to Mrs. Van Alen and talking
8 about a list of stocks that were very heavily depressed
9 and had declined substantially, and I told her that I did
10 not think there was much risk if she bought -- in buying
11 those stocks.

12 Q Did you guarantee her that there would not be
13 any risk?

14 A No.

15 Q What did she say?

16 A She said, "Well, I don't know, Paul." I said,
17 "If you don't want to invest the whole amount, then we
18 will invest a half or a portion of your assets."

19 Q What did she say?

20 A I understood Mrs. Van Alen to say, "Go ahead."

21 MR. SHAFFER: Can we have when and where on
22 that, Judge?

23 THE COURT: Yes.

24 Q When and where do you recollect that
25 conversation?

1 [868] deGive - cross A-654
2 A It was a conversation in late February or early
3 March, to the best of my recollection.

4 MR. SHAFFER: Of what year?

5 MR. BARIST: 1970.

6 THE WITNESS: 1970.

7 Q Did you have any other conversation with Mrs.
8 Van Alen in late March or after -- withdraw that.

9 Did you have another conversation with Mrs. Van Alen
10 in March of 1970 with respect to those purchases that you
11 made at the beginning of March 1970?

12 A I did.

13 Q Where? Where did that conversation take place?

14 A Mrs. Van Alen called me on the phone, and she
15 said, "Paul, I see you bought stocks. I didn't know we
16 agreed to buy stocks." And I said, "It was my understanding
17 that we would buy only not the full percent but a portion
18 of your assets."

19 Q What did she say?

20 A Well, she said, "Send me a list of the securities
21 and the purchase price."

22 Q Did you ever do that?

23 A To the best of my recollection, I did.

24 Q What are treasury bills?

25 A Those are bills purchased -- United States

obligations purchased at a discount, which mature at par and therefore you have no loss in them if the bond prices fluctuate.

Q Are they obligations of the federal government?

A They are.

Q Are they short term or long term?

A Bills are short term.

Q What is your commission or charge for purchasing treasury bills for a client? What was it in the period 1969?

A My commission?

Q Yes.

A None.

Q What was Dominick & Dominick's charge?

A They charged a nominal fee of \$10 per transaction.

Q After you sold out the securities in Mrs. Van Alen's account on February 20, 1969, what did you do with the money?

A To the best of my recollection, I put them in treasury bills, the funds.

Q After the sales in the end of May, 1969, what did you do with the moneys that were received from the sale of those securities?

A To the best of my recollection, I put them in

1 [870] deGive - cross A-656
2 treasury bills.

3 Q Did they stay in treasury bills until you went
4 back in the market in October 1969?

5 A They did.

6 Q You have testified, sir, that you got out of
7 Mrs. Van Alen's -- withdraw that -- you got out of the
8 market for Mrs. Van Alen on or about February 20, 1969.
9 Could you tell us, sir, what happened to the price of
10 stocks after February 20, 1969?

11 A They went down.

12 Q After you got out of the market on May 30, 1969,
13 what happened to the price of stocks --

14 MR. SHAFFER: Your Honor, I have to object. I
15 let one question go by. Price of stocks. What stocks?
16 Talking about this broad cross-section of the market
17 where he bought some behind, some equal, and some ahead of
18 the market? Individual issues? Gold stocks that go ahead
19 of the market?

20 THE COURT: Sustained.

21 Q Did the stock market as a whole go up or down
22 after you made the sales on May 30, 1969?

23 A The averages went down.

24 Q Is the same true after February 20, 1969, the
25 averages went down?

1 [871] deGive - cross A-657
2 A After February and after May. After May the
3 Dow Jones average went down more than 150 points.

4 Q Let me draw your attention to the loan Mrs.
5 Van Alen took out from the First National City Bank in
6 October 1969. With your attention so focused, did you
7 arrange that loan for Mrs. Van Alen?

8 A I did not.

9 Q What did you do with respect to that loan?

10 A I called my brother-in-law, who is an officer
11 of the First National City, and I said Mrs. Van Alen has
12 asked me if I knew of anyone in the First National City
13 Bank who could take care of her in terms of transferring
14 her custody account from the Bank of New York to the First
15 National Bank. She said, "Paul, I don't want to go into
16 the main office and be kicked around," or words to that
17 effect.

18 I called my brother-in-law and asked him for the name
19 of an officer in the custody department, and I was given
20 the name of the officer, and I got in touch with the name
21 of the officer and said, "Mrs. Van Alen is interested in
22 opening an account, a custody account with you, and she
23 may from time to time want to borrow money." And he said,
24 "How do I reach her?" And I gave him her telephone number
25 and address.

1 [872] deGive - cross A-658
2 Q Did you have anything further to do with the
3 transaction by which Mrs. Van Alen took out a loan from
4 the First National City Bank, that you can recall?
5 Anything further?

6 A I recall receiving a call from Mrs. Van Alen
7 at some club saying, "Paul, the officers are here with the
8 forms. Should I sign them?" And I said, "What are the
9 forms?" And she said, "Well, I guess they are just the
10 usual bank forms."

11 I said, "What type are they?" She said, "Well, here's
12 a thing called a custody agreement and here's a thing
13 called a loan or note agreement, and here is a discretionary
14 power."

15 I said, "Well, if those are the normal bank printed
16 forms, I presume they are all right. Who's there?"
17 She told me, "There are two officers here from the bank."

18 "Well," I said, "if they tell you that those are the
19 bank forms, it's OK to sign them, but I haven't read them,
20 I don't know about them."

21 Q Anything else that you have any connection with
22 that First National Bank loan, that you can recall, any-
23 thing else?

24 A I believe Mrs. Van Alen called me back after and
25 said they were signed, she had signed them.

1 [873] deGive - cross A-659
2 Q Anything else? Did you have any other contacts
3 with people from the First National City Bank in regard to
4 that loan?

5 A I did. I received a call from a bank officer,
6 one of the two ~~that~~ were with her. And he called me and
7 he said, "Paul, the signatures are in order, the agreement
8 is signed, and you may now purchase stocks at any time in
9 your judgment."

10 Q Did you ever see the power of attorney which
11 Mrs. Van Alen gave to the First National City Bank in
12 October 1969?

13 A I did not.

14 Q Drawing your attention to the fact, as you have
15 testified, to your testimony, that these transactions were
16 made at your instruction through Dominick & Dominick, in
17 the years 1969 to 1970, the period of the complaint, the
18 transactions for Mrs. Van Alen, were commissions on New
19 York Exchange stocks fixed? In other words, could you get
20 a different commission?

21 A They were fixed by the New York Stock Exchange.

22 Q In other words, if the bank had gone to Merrill
23 Lynch, it would have paid the same commission that it paid
24 Dominick & Dominick, is that correct?

25 MR. SHAFER: Is he competent to answer that?

1 [911]

deGive - redirect

A-660

2 him.

3 THE WITNESS: May I have the question again?

4 THE COURT: If the point is conceded, let us move
5 on.

6 MR. SHAFFER: All right. It is conceded.

7 Your Honor, I have a final question on
8 Plaintiff's Exhibit 63 and Defendants' Exhibit 98B, and
9 I will ask it:

10 Q On January 9 and January 12 you made some sales,
11 1970, for your wife. That is shown on page 4.

12 MR. BARIST: So conceded.

13 A I did.

14 Q In that same period, looking at Defendants'
15 Exhibit 98B in evidence, I don't see any sales for Mrs.
16 Van Alen until January 28, 1970. Is that so?

17 MR. BARIST: So conceded.

18 A That is correct.

19 Q Looking at Plaintiff's Exhibit 2 in evidence --
20 do you have that before you?

21 MR. SHAFFER: Would you give him a copy of
22 Plaintiff's Exhibit 2, please?

23 Mr. Barist, so this moves along, could I get a
24 copy of your Defendants' Exhibit 116? It is the
25 Technical Comments.

MR. BARIST: I wish I knew where it were right now.

MR. SHAFFER: Does Mr. deGive have it? It is Technical Comment.

Q Mr. deGive, on February 11, 1969, you made a substantial series of purchases which you have previously described as a major move in my client's accounts. Directing your attention to that testimony, do you recall it?

A Yes.

Q Did you make that major move in the exercise of your discretion that you enjoyed over my client's custody accounts and the Dominick & Dominick account, or did you do it at the direction of Mrs. Van Alen?

A February 11?

Q Yes.

A I made it in accordance with the discretionary power that I had at Dominick & Dominick and the bank.

Q Before that purchase had you had a meeting with Mr. and Mrs. Van Alen?

A I don't recall a meeting before those purchases.

Q Did you have a discussion with Mr. and Mrs. Van Alen before those purchases?

MR. BARIST: Your Honor, again I think it is

2 beyond the scope of direct.

3 THE COURT: Sustained.

4 MR. SHAFFER: I will accept your Honor's ruling,
5 of course, I must, but is your Honor aware that Mr. Barist
6 went into this particular conversation?

7 THE COURT: He did. And he was very careful
8 to indicate that he was referring to whatever conversation
9 may have transpired following the purchases and then sales
10 one week later.

11 Q Following the sales, did you have a conversation
12 with Mr. and Mrs. Van Alen, that is, the sales a week
13 later after those February 11 purchases?

14 A At or about that time I remember having a
15 meeting with the Van Alens.

16 Q Where was that meeting?

17 A The best of my recollection, it was at the
18 Westbury Hotel.

19 Q What did you discuss at the meeting?

20 A I told Mr. and Mrs. Van Alen that I thought I had
21 made a mistake and that stocks should be sold, I'd rather
22 do it now than take losses later.

23 Q Had you already commenced making the sales that
24 you made on February 20 and February 18?

25 A I don't remember. It was around that time.

1 [914] deGive - redirect A-663
2 Q In the week of February 10 was the market in a
3 testing period?

4 A I would have to look at the charts.

5 Q We will give you your charts for 1969. Exhibits
6 35 through 41.

7 Do you want the scroll?

8 MR. BARIST: Your Honor, I am going to object to
9 this line of inquiry and object to the first question. We
10 are going back to the chart, which I did not once unroll.
11 I object as beyond the scope of recross.

12 MR. SHAFFER: Your Honor, I will tell you why I
13 am going into it, if I may.

14 THE COURT: What is it?

15 MR. SHAFFER: Mr. Barist put in evidence during
16 this last go-around Mr. deGive's technical chart of
17 February 17, 1969. There is the Technical Comments.

18 MR. BARIST: The comments.

19 MR. SHAFFER: And I think that opens up the
20 question I am asking.

21 THE COURT: What was the question?

22 Q Otherwise I could not go into it, Judge.

23 THE COURT: What is the question?

24 MR. SHAFFER: The question is, was the market
25 entering a testing period the week of February 10?

MR. BARIST: In that case, referring to Mr. deGive's Technical Comments, I ask that the witness be allowed to refer to his Technical Comments and be asked to answer the question off the Technical Comments, which is the market letter.

MR. SHAFFER: I did not want to do it that way, Judge. But I will, if you --

THE COURT: See if you can do it that way.

MR. SHAFFER: All right.

THE COURT: Referring to Defendants' 116 in evidence.

Q Mr. deGive, without me walking around there, I am going to read to you what is on Technical Comment.

"Last week the market entered a testing period where buying commenced to increase. However, to date there has not been sufficient follow-through to signal a broad advance.

"Accordingly, a return to the sidelines is suggested until the market once more records a fully oversold condition."

Did you write that Technical Comment?

A I did.

Q What is the date of your Technical Comment?

A February 17. You asked about February 10.

Q Wouldn't that be the week of February 10? I mean, when you write something on February 17 and you talk about last week, aren't you talking about seven days before, or does your calendar work differently?

MR. BARIST: I am going to object to the form of the question. I think it is purposefully confusing.

THE COURT: Strike the last portion.

Q When you wrote on February 17, 1969, referring to last week, were you talking about February 10, that period?

A I was talking about the week before February 17.

Q Would that include February 10?

MR. BARIST: I concede that seven days back from February 17 would run February 10 to February 17.

MR. SHAFFER: Your Honor, it is late in the day and I know you want to finish this witness and I don't want to add colloquy, but I would like to make a point.

THE COURT: Go on and ask the question.

Q Did the week before February 17, 1969, include February 10, and the following days, the 11th, the 12th, the 13th, the 14th, and the 15th, and so on?

A It did not include -- it included the days prior to February 17, but February 10 was talking about the material prior to February 10.

Q I understand that. All I want to know is:
When you said in this Technical Comment: "Last week the
market entered" -- I want to know what days you had
encompassed in the words "last week"? Did it include
February 11, 12, 13, 14, and so on? Just yes or no.

A Yes.

Q Do you usually commit accounts in a substantial
way when the market is in a testing period?

MR. BARIST: Objection.

THE COURT: Sustained.

Q Mr. deGive, in this conversation that you had
with Mrs. Van Alen, you mentioned something about that
you had made a serious mistake with respect to the February
11 purchases, is that right, when you met with her around
February 20?

MR. BARIST: Objection, your Honor. He never
used the word "serious."

THE COURT: Sustained.

Q Did you say something about you made a mistake?
Directing your attention to your testimony with respect to
the meeting that you had with the Van Alens at the
Westbury, did you mention the word "mistake"?

A I did.

Q What did you tell them?

1 [918] deGive - redirect A-667
2 A I told them I thought I had made a mistake
3 and I would rather correct it now than later.

4 Q When you said you would rather correct it now
5 than later, had you already corrected it before you met
6 the Van Alens, or were you looking to them for their
7 comments before you made the sales on February 20?

8 MR. BARIST: Objection; asked and answered on
9 this very cross.

10 THE COURT: You may answer. What is the answer?

11 A It was about the time. I don't recall whether
12 it was the day or after.

13 THE COURT: After what?

14 THE WITNESS: That I was selling. It was within
15 a day or so.

16 THE COURT: You mean that the conversation that
17 you are speaking about may have come either before you
18 made sales or after?

19 THE WITNESS: No, I mean that the sales could
20 have been made at or about that time, and that the meeting
21 could have come after the sales were made.

22 THE COURT: That the meeting could have come
23 before the sales were made --

24 THE WITNESS: No.

25 THE COURT: -- or could have come after?

THE WITNESS: No, the meeting, to my best recollection, occurred at the time I was making the sales or after, not before.

THE COURT: Are you referring to the --

THE WITNESS: The meeting at Westbury Hotel.

THE COURT: Just a moment. Aren't you talking about two categories of sales here? First of all, some sales that you made before you went to Westbury and met, and then some sales after you went to Westbury and met.

THE WITNESS: It could have been.

THE COURT: Or perhaps I am wrong.

MR. SHAFFER: I don't think so.

THE WITNESS: I could have made sales before I went to the Westbury and met.

THE COURT: The sales you went to the Westbury referred to mistakes regarding purchases?

THE WITNESS: That's right. So my best recollection is that the conversation was after the sales.

THE COURT: The conversation was after the sales. So that when you went out to talk with them, you had already made the sales, you were not asking their permission for the sales to be made.

THE WITNESS: No.

MR. SHAFFER: That is where I was going to.

Q Going to the May 25 sales shown on Exhibit 2, did you sell all her stocks beginning then because those stocks were weak?

MR. BARIST: I object as beyond the scope of recross.

THE COURT: How does it form --

MR. SHAFFER: Because he put in a Technical Comment, your Honor.

THE COURT: Well, I will tell you now, you can ask about the Technical Comments, Mr. Shaffer, but we are not going to use those eight or ten Technical Comments to reopen the whole case. In fact, I think you might try to conclude your inquiry within the next ten or twelve minutes.

MR. SHAFFER: I had planned to, Judge.

THE COURT: Altogether.

MR. SHAFFER: I had planned to.

THE COURT: Sustained as to this.

Q The Technical Comment that Mr. Barist put in May 26, 1969, dated May 26, 1969, concludes with the last sentence, Mr. deGive: "Investors should now adopt the policy of eliminating weak holdings."

Are you aware that your comment said that and you wrote it?

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A Yes.

Q On May 26, 1969, as shown by Plaintiff's Exhibit No. 2, you made a lot of sales on May 27, 1969.

MR. BARIST: So conceded.

Q Were you selling weak holdings?

MR. BARIST: Objection.

THE COURT: Overruled.

MR. BARIST: I withdraw the objection, your Honor.

Q Were you selling weak holdings?

A I was selling weak holdings.

Q You were not acting on a sell signal?

A I was acting on a sell signal.

Q Were you selling what you had bought as a cross-section of the market containing some stocks which were behind the market, some stocks which were even with the market, and some stocks which were ahead of the market?

MR. BARIST: Objected to as beyond the scope.

THE COURT: Sustained.

Q When Mrs. Van Alen did not get the loan at the Bank of New York, and you called your brother-in-law, Mr. Hoguet -- is it?

A Yes.

Q H-o-g-u-e-t?

A Correct.

1
2 VAN ALLEN V DOMINICK et al

New York, N. Y.

November 16, 1976 - 10 a.m.

3
4 THE COURT: Good morning.

5 MR. SHAFFER: Good morning, your Honor.

6 Avery Rockefeller.

7 You want to go to witnesses now?

8 THE COURT: Yes. Just one moment. I have
9 received this morning a submission by Mr. Shaffer in
10 connection with the evidentiary question which arose
11 yesterday afternoon.

12 I have read the submissions. I have inquired
13 as to whether the Kamerman & Kamerman set forth -- let me
14 see Court's Exhibits 1 and 2, please -- on Court's
15 Exhibit 2, identified thereon as certified public
16 accountants, are and were the same Kamerman & Kamerman
17 who are the attorneys of record in this case. And I am
18 told that they are one and the same, Jerome and David
19 Kamerman --

20 MR. SHAFFER: David, his father.

21 THE COURT: -- are both attorneys --

22 MR. SHAFFER: They are.

23 THE COURT: -- and have a firm at 500 Fifth
24 Avenue.

25 MR. SHAFFER: Correct.

1 [934]
2 THE COURT: And they are both certified public
3 accountants and have their firm at --

4 MR. SHAFFER: Had a firm, your Honor, at that
5 time.

6 THE COURT: -- or had a firm at that time at
7 that location.

8 MR. SHAFFER: Right.

9 THE COURT: The Court is faced with an
10 invitation to have a voir dire to inquire into certain
11 factual matters asserted by plaintiff's counsel, which are
12 different than the factual allegations asserted by the
13 defendants' counsel. This case is already more than two
14 days beyond the anticipated terminal point, we are still
15 on the plaintiff's case, we are struggling to get to the
16 defendants' case. The defendant has indicated a willingness
17 to try to hold his anticipated three days of defense
18 material to three days, despite the increased length of
19 the trial thus far, and if at all possible to conclude
20 this case by the end of this week, early afternoon, Friday.
21 The Court has already had to shift another trial which was
22 scheduled to commence Thursday and continue Friday.

23 Given all of this, I adhere to my ruling
24 announced yesterday afternoon. I adhere to the basis for
25 the ruling as being Rule 403, and in addition assert that

1
2 in the exercise of the supervisory obligations imposed
3 upon the Court in circumstances where issues are
4 presented such as are presented here, the Court, given
5 those obligations, relies upon them as well; denies the
6 request for voir dire and adheres to the ruling yesterday.

7 Let me note also that there is no dispute,
8 as far as I can perceive, that Court's No. 2 was sent to
9 Mr. deGive on CVA letterhead.

10 Mr. Shaffer, you have your exception.

11 MR. SHAFFER: Right, Judge.

12 THE COURT: And your next witness is?

13 MR. SHAFFER: May I make a fifteen-second
14 statement on the record with respect to the submission,
15 your Honor?

16 THE COURT: No, I think not, Mr. Shaffer. . I
17 have devoted all the time to that that I plan to devote
18 to it. I think your papers speak for themselves. We will
19 move on.

20 MR. SHAFFER: All right. Will they be marked as
21 a Court exhibit, your Honor?

22 THE COURT: Yes. Would you mark these in toto
23 as Court's exhibit. That would be Court's Exhibit No. 4.

24 (Court's Exhibit No. 4 marked.)

25 MR. SHAFFER: Mr. Rockefeller.

XXX

1970.

A I think the only ones that I would be aware of in 1969 or 1970 would be the orders placed through Dominick.

Q All right, fine.

A And I would have to assume that those orders were initialed at that time.

Q You would assume that.

A Yes.

Q But do you know that?

A I do not know that.

Q So your assumption is not based on anything but the hope that the practice was followed?

A Correct.

Q Were you aware that the rule further provided that no member, allied member or employee of a member organization exercising discretionary power in any customer's account and no member organization shall permit any member, allied member or employee exercising discretionary power in any customer's account to effect purchases and sales of securities which are excessive in size or frequency, in view of the financial resources of the customer? Were you aware of that rule?

A That is correct.

THE COURT: No, I would like to continue.

MR. FITZPATRICK: Your Honor, I am going to conduct the cross.

THE COURT: All right. That is Mr. Fitzpatrick?

MR. FITZPATRICK: Yes, sir.

CROSS-EXAMINATION

BY MR. FITZPATRICK:

Q Mr. Rockefeller, you testified that Mr. Mitchell was delegated the duties of showing compliance with the stock exchange rules.

A I did.

Q Do you know what steps he took to carry out those duties?

A Yes. Mr. Mitchell had available to him the IBM run referred to earlier, the confirms referred to earlier. He also had a monthly IBM run that was available listing all trades by each registered representative. And he also had copies of the monthly -- the customer's monthly statements, which were reviewed on a monthly basis.

Q Do you know as a fact he did review these documents?

A As I said earlier, I had often been in his office and these documents were there, I'd seen him or

his assistant reviewing those documents.

Q Would the IBM runs include trades for Mrs. Van Alen's account?

A They would include all.

Q All Dominick & Dominick?

A Include all Dominick & Dominick trades.

Q In the ordinary course did the statements reviewed by Mr. Mitchell include statements for Mrs. Van Alen's account at Dominick?

A The monthly statements, yes.

Q By the way, sir, are you at present connected with any brokerage firm?

A No, I am not.

Q Turning to the accounts in the banks, were you aware in 1969 and 1970 that Mrs. Van Alen had custodian accounts at the Bank of New York and First National City Bank?

A I was not.

Q As a matter of practice at Dominick, if a registered representative employed by Dominick had discretion over a customer's account, for trading authority over a customer's account maintained at a bank, was that registered representative required to inform Dominick of that fact?

1
2 A Under the rules at that time, no.

3 Q Did you believe at that time that any rule of
4 the New York Stock Exchange required you to in turn
5 require your registered representative to inform you of
6 that fact?

7 A I cannot recollect.

8 Q Did you believe that your policies with
9 respect to accounts maintained at a bank -- I withdraw
10 that.

11 THE COURT: Would Mr. Mitchell, in reviewing
12 monthly statements of customers, also review any
13 statements that pertained to an account at a firm or bank
14 other than D & D? What I am referring to is: If the
15 plaintiff here, Mrs. Van Alen, had an account at the Bank
16 of New York, and if all of the transactions were made
17 through Dominick & Dominick, and if Dominick & Dominick
18 was receiving the commissions, would Mitchell have
19 reviewed whatever came to Dominick & Dominick regarding
20 such trades or transactions?

21 A It would depend on how the bank entered the
22 order. Some accounts at some banks had a special order
23 at Dominick & Dominick whereby the account was carried
24 in the customer's name. If the order had been placed at
25 a bank through the bank's own account, there would be no

way that Dominick & Dominick would know who the bank's customer was.

THE COURT: Do you know which situation pertained here as far as First National City Bank and as far as the Bank of New York was concerned with regard to Mrs. Van Alen's account?

THE WITNESS: I believe these accounts were -- these orders were placed through the bank's own account.

THE COURT: You have learned that since all of this?

THE WITNESS: Yes.

THE COURT: Given that, what would be the method of review if any which pertained to those trades insofar as Dominick & Dominick was receiving commissions in connection with them?

THE WITNESS: It would be impossible to be able to review those trades in that manner.

THE COURT: What could you review? You got the money, you got the commissions.

THE WITNESS: No, we would receive the order from the bank. The order would be executed in the bank's name and reported back to the bank. And we wouldn't know -- we would get --

THE COURT: What would you be paid for?

1 THE WITNESS: Executing the commission on the
2 floor of the exchange, which under the law the bank
3 cannot do, so they would give that business to the member
4 firm of the stock exchange, the order would be executed
5 and reported back to the bank.
6

7 But in all the orders we received from a bank
8 on an individual day, we would not know who the bank's
9 customer was. We only look to the bank as a customer,
10 and could not go beyond that point because --

11 THE COURT: You would not know that it pertained
12 to Mrs. Van Alen?

13 THE WITNESS: That is correct.

14 THE COURT: Then how would you know who the
15 commission, that is, the third of the commission that went
16 to the registered representative, how would you know which
17 registered representative got that?

18 THE WITNESS: I see what you are getting at.
19 When the bank placed the order, they would often designate,
20 or almost always designate the registered representative
21 who was to receive the credit from that order.

22 THE COURT: So that Dominick & Dominick would
23 know that a trade had occurred at a bank --

24 THE WITNESS: At a bank.

25 THE COURT: -- being put through your firm. Your

1
2 firm would receive a commission for executing the
3 transaction.

4 THE WITNESS: That is correct.

5 THE COURT: And someone in your employ at
6 Dominick was going to get a commission with regard to the
7 matter?

8 THE WITNESS: That is correct. But we wouldn't
9 necessarily know. Very often in my own case, for example, an
10 order would be placed with a bank, and all of a sudden I
11 would get a confirm the following day with the bank's
12 name on it and my credit. But I wouldn't necessarily know
13 who placed that order.

14 THE COURT: You mean what customer?

15 THE WITNESS: What customer of the bank's placed
16 that order. In those days this was a --

17 THE COURT: Could you know at any given moment
18 how much income you were receiving by virtue of what was
19 happening with respect to a particular customer who was
20 doing much of this kind of business with other -- well,
21 with banks? Could you ever add up a column of figures
22 and say, "Well, look, this year I made X thousand dollars
23 as a result of what was happening on the part of my
24 customer so-and-so," even though it was happening somewhere
25 other than at D & D?

THE WITNESS: Conceivably that's possible if you knew the amount of trades put through the bank. In those days banks very often would give business, what is today called soft dollar business, in return for research or other information or that I might provide to a bank as an officer of the firm.

Conceivably you could find out, by adding up your commissions designated to you from a certain bank, what had been directed to you -- you would know, directed to you from that bank.

THE COURT: As to what customer it pertained?

THE WITNESS: But I don't know, you would not -- now, I don't know whether Paul deGive had other customers at the First National City Bank or the Bank of New York on this same basis.

THE COURT: Of course, if he did not, then it would be simple.

THE WITNESS: It would be simple. But if he did --

THE COURT: But if he had three customers there, say?

THE WITNESS: Unless he contacted the bank and got that information from the bank, there was no way that Dominick & Dominick would know that.

THE COURT: There would not be any identifying number on the document that came to you --

THE WITNESS: No.

THE COURT: Either a bank number or some other.

THE WITNESS: There would be a bank number.

THE COURT: And that number related to the customer's account, I take it?

THE WITNESS: No. It would be our number relating to the bank.

THE COURT: Your number relating to the bank.

THE WITNESS: Our assigned IBM number relating to the bank. The Bank of New York had a number, and the First National City Bank had a number.

THE COURT: And the bank's number, that would relate to the customer's account at the bank?

THE WITNESS: No.

THE COURT: No?

THE WITNESS: We would not know that number. They might have such-and-such a number.

THE COURT: But you would not know that.

THE WITNESS: But when they placed the order they would just place the order, "Buy a thousand U. S. Steel." We report back to them, "We bought for your account a thousand U. S. Steel." Then for our internal

records we would have a number, because that is the way machines work. But we would not know what the bank number was.

THE COURT: Would you know at the end of a given period, let us say at the end of your fiscal year at that time, how much Dominick & Dominick had earned by way of commissions by virtue of dealings with bank X, Y or Z?

THE WITNESS: Yes. That number would be available. We would know the amount of commissions we received from those banks.

THE COURT: And you would know how much commission you in turn would pay to one of your own people as a result of that type of transaction?

THE WITNESS: As designated by the bank, correct.

BY MR. FITZPATRICK:

Q Is the substance of your testimony, then, Mr. Rockefeller --

MR. SHAFFER: I object to that.

THE COURT: Reframe it.

Q Did you in 1969 and 1970 consider, in a situation where a bank made a trade at Dominick, that the bank was Dominick's customer?

A That is correct, yes.

1 [981]
2 Q And you did not look beyond the bank to its
3 customer?

4 A No.

5 Q Did you consider at the time that that practice
6 was in any way in violation of any rule of the New York
7 Stock Exchange?

8 A No.

9 Q With respect to Mrs. Van Alen's accounts at
10 Dominick and with respect to Mr. deGive, did you believe
11 at any time in 1969 or 1970 that Dominick was in violation
12 of any rule of the New York Stock Exchange?

13 A No, I did not.

14 Q Did you believe that it was in violation of any
15 rule of the New York Stock Exchange relating to a review
16 of Mrs. Van Alen's account?

17 A No.

18 Q Or the supervision of Mr. deGive?

19 A No.

20 Q Did you believe that Dominick was in violation
21 of any stock exchange rule?

22 MR. SHAFFER: Your Honor, does this belief
23 proof help you?

24 THE COURT: He can do it. I will take it.

25 MR. FITZPATRICK: Your Honor, it is a fraud

claim.

THE COURT: Yes, right.

Q Did you at that time believe that you were in violation of any rule of the New York Stock Exchange?

A No, I didn't believe we were in violation.

MR. FITZPATRICK: No further questions, your Honor.

THE COURT: Just a moment, please.

Referring to Plaintiff's 11 in evidence, page 20, which is the company policy toward its registered representatives, paragraph 2 or section 2 states that the policy does not permit its salesmen to carry discretionary accounts for other than immediate family members.

Would it not have been a simple matter, given that policy of Dominick & Dominick, that is, assuming that you had a discretionary account for someone other than an immediate family member, simply making an arrangement at some bank to have a discretionary account at the bank but have all the trades take place through Dominick & Dominick, knowing that you would pick up one-third commission once Dominick got its two-thirds commission and been in perfect compliance with that particular policy of the company?

THE WITNESS: Yes, sir, it would. The reason, if I may elaborate on this a little bit, is that with the

1 rapid growth in the business during the Sixties, the
2 reason this rule was put in was to discourage many of the
3 inexperienced salesmen that we had in some of our offices
4 around the country from carrying discretionary accounts at
5 a time when the market was moving ahead quite rapidly.
6 And we did have discretionary accounts by the more
7 experienced people, but this was the general policy, to
8 discourage them. And it is not a complete prohibition,
9 actually. It was a control method.

11 THE COURT: But even where you have the
12 discretionary account --

13 MR. SHAFFER: Excuse me, your Honor --

14 THE COURT: -- your policy envisioned that there
15 would be oversight by key people --

16 THE WITNESS: That is correct.

17 THE COURT: -- who were part of Dominick &
18 Dominick?

19 THE WITNESS: Yes, sir, that is correct.

20 THE COURT: And even as to that, if you wished
21 to avoid oversight, if that was one's wish, as a
22 registered rep, at Dominick & Dominick, then again it
23 would be a simple matter, would it not, to have a customer
24 open an account at the bank and use the method that we
25 have been discussing earlier?

1 [984]
2 THE WITNESS: That would quite definitely
3 circumvent the intent of this.

4 THE COURT: You would still get the commissions
5 as registered rep?

6 THE WITNESS: Yes.

7 THE COURT: Dominick & Dominick would even get
8 a larger share of the commissions and it would not be any
9 oversight to be exercised under the policy and as it was
10 implemented?

11 THE WITNESS: Yes. That would be a way of
12 circumventing this intention.

13 THE COURT: Your witness. Do you want to inquire
14 further?

15 MR. SHAFFER: I don't, your Honor, but I would
16 like, if it is not too burdensome to the reporter, to read
17 the seventh from last question that your Honor asked,
18 because it was an important question and I did not
19 understand it. I did not want to interrupt. I tried, but
20 you did not catch my eye.

21 (Record read)

22 MR. SHAFFER: Thank you. I have no further
23 questions.

24 MR. FITZPATRICK: I have one question.

25 BY MR. FITZPATRICK:

1 [985]
2 Q Mr. Rockefeller, I believe you testified that
3 the reason for that policy was to discourage inexperienced
4 salesmen from having such accounts, but that more senior
5 people were permitted to have those accounts, to have
6 trading authority over accounts.

7 A Yes. There were exceptions from this policy.
8 The exceptions were basically for the more senior people,
9 experienced salesmen, mainly the New York office.

10 Q Would Mr. deGive fall within that category?

11 A Yes, he would.

12 Q That is, within the category of more senior
13 persons?

14 A Yes.

15 THE COURT: Referring now to accounts at
16 Dominick & Dominick.

17 THE WITNESS: Yes, sir.

18 THE COURT: If there are no further questions,
19 step down, sir.

20 MR. SHAFFER: May this witness be released?

21 THE COURT: Yes, sir. We will take our recess
22 about ten minutes now.

23
24 MR. SHAFFER: Thank you for coming, Mr.
25 Rockefeller, and you may go about your business.

(Recess)

has doubled in size under the discretionary power exercised by the customer's man for the customer.

Bearing in mind all of those assumptions, I want you to further assume that on or about February 11, 1969, the customer's man came to you and told you that his system had indicated to him that a buy signal had been established and he wanted to make a major move for his customer, exercising his discretionary power, and purchase approximately half to three-quarters -- at least a half and perhaps as much as three-quarters or all of the money available for the customer on his buy signal.

My question to you is: Based upon the standards of supervision known to you in the industry, do you have an opinion as to whether or not, by the application of those standards of supervision to the customer's man, you would allow the purchase? I just want to know yes or no: Do you have an opinion?

A Yes.

MR. BARIST: I object to the question.

THE COURT: Let me have the last portion following "Do you have an opinion."

(Record read)

MR. SHAFFER: He says he has an opinion.

MR. BARIST: I object to the question, your

Honor. May I be heard?

THE COURT: Yes, sir.

MR. BARIST: First, in terms of the hypothetical that was phrased, as fast as I could follow them, one, plaintiff did not testify that she wanted long-term investments; she testified she had no desires one way or the other as to the length of time to be holding securities.

Secondly, with respect to, but getting to the guts of the question itself --

THE COURT: Let me take that one first, the long-term. I do not recall that she said anything about long or short term, Mr. Shaffer. I do recall that Mrs. Van Alen testified that she wanted Mr. deGive to nurture her account and stated that she was interested in having that done in relation to providing protection during her old age.

MR. SHAFFER: When the time comes I will amend it accordingly, if the time comes.

THE COURT: Go ahead, sir.

MR. BARIST: I argue that the question itself, if answered, is irrelevant. The plaintiffs have established that the defendant deGive had the legal power to trade. They are now asking this witness whether

1
2 somebody else who did not have the legal power to trade
3 would have allowed deGive to do what the plaintiff gave
4 him the legal authority to do.

5 Thirdly, it seems to me that what we are getting
6 into here is a question as to -- well, I will stop.

7 THE COURT: Let me address that particular
8 question. If Mr. Shaffer modifies it to state "If you
9 had been supervisor of this particular registered
10 representative, what would have been your advice with
11 regard to this move?", I would find that acceptable in
12 answer to that present objection.

13 MR. SHAFFER: Then I would, of course, your
14 Honor, amend my question accordingly.

15 MR. BARIST: The third objection. The evidence
16 at this point in time is clear that deGive did not go to
17 a supervisory personnel to ask for permission to make the
18 trades. The evidence is further clear that he was under
19 no obligation to so go and ask for permission. The
20 rules of the New York Stock Exchange at most required
21 an initialing of order tickets, not a discussion as to
22 each and every trade.

23 The guts of this case is fraud. Did deGive
24 act with fraud, did Dominick act with fraud? It seems
25 to me of no relevance whatsoever, in examining the issue

1 of fraud, which is the intent of mind of deGive and
2 Dominick, to consider what this man would have done in
3 a completely different set of facts which are absent
4 from our case.
5

6 THE COURT: I will take it, as I have indicated,
7 however. Go ahead.

8 MR. BARIST: One further point, your Honor. I
9 think again, and I know your Honor ruled on this at the
10 beginning of this case, but I think again we are now
11 getting into the whole area of supervision, which I
12 believe was taken out of this case approximately a year
13 and a half ago.

14 THE COURT: I made my ruling on that, counselor,
15 and I don't plan at this late stage to change it, nor do
16 I think I have had any reason so far to change it.

17 MR. BARIST: Thank you.

18 MR. SHAFFER: Judge, as most lawyers who win
19 a point do, I want to say something, but I am going to
20 bite my tongue.

21 THE COURT: Thank you.

22 Q Mr. McDonald, in the hypotheticals that I
23 listed to you, I mentioned something about the customer's
24 objective. Rather than repeating my misstatement, did
25 you hear, when his Honor said that if I amended my

1 assumption, my hypothetical --

2
3 THE COURT: In two respects.

4 Q -- in two respects, and I will repeat those
5 two respects, and ask you then a question, after I have
6 corrected the assumption. The first correction in the
7 assumption is, I want you to assume that the customer's
8 direction to the account executive at the time she gave
9 him discretionary authority was that she wanted the
10 money placed with him to be nurtured so that it would
11 grow for some purpose she had in later life; and the
12 second change is, I want to ask you -- what was the
13 second one, your Honor?

14 THE COURT: It had to do with supervision.

15 MR. SHAFFER: Yes.

16 Q And the second is, based upon those assumptions,
17 do you have an opinion as to what your advice to the
18 account executive would be when he came to you on
19 February 11, 1969, and said to you that he wanted to make
20 a major move as I have described in that customer's
21 account?

22 The question is, do you have an opinion, with those
23 changes?

24 A I do.

25 MR. BARIST: Your Honor, I thought your Honor

1 had changed it to take out what your advice would be
2 to the customer's man.

3
4 MR. SHAFFER: You told me to ask it that way.

5 THE COURT: Yes.

6 Q What would your advice be at that time with
7 respect to making the transactions?

8 A I would let him proceed.

9 Q Now I want you to further assume that this same
10 technician came back to you on or about February 18 of
11 that same year, approximately seven days later, and told
12 you that he had received an abortion of his signals and
13 that he wanted to make a major move in those accounts
14 by selling everything he had bought one week earlier on
15 February 11. Do you have an opinion as to what your
16 advice would be to the account executive? Yes or no.

17 A Yes.

18 MR. BARIST: Objection to the words "abortion"
19 and "major move."

20 THE COURT: Overruled.

21 A Yes.

22 Q The answer is yes?

23 A Yes.

24 Q What is that opinion?

25 A I would go ahead with the sale.

Q You would allow it.

A Yes.

Q Your advice would be it would be all right.

Now I want you to further assume that on or about April 13, 1969, the customer man's came back to you and said that his charts and material were now giving him a buy signal and he wanted to make a major move and purchase stocks to the extent of the account or the greatest percentage of it, 80 percent or more, do you have an opinion as to what your advice to him would be with respect to that move?

MR. BARIST: Objection as to the date, which is contradicted by the evidence, and as to the percent, which is not in evidence.

THE COURT: I don't recall the percent.

MR. SHAFFER: All right, your Honor, I will just say:

Q He wanted to make a major move.

THE COURT: And the date?

Q On or about April 30, 1969.

MR. SHAFFER: And I refer the Court to Plaintiff's Exhibit 2, which is a series of purchases on that date.

THE COURT: April 30.

MR. SHAFFER: April 30, 1969.

THE COURT: And anything about signals in this question?

MR. SHAFFER: Yes, he got a signal to buy.

THE COURT: A buy signal?

MR. SHAFFER: A buy signal.

Q Do you have an opinion as to what your advice would be with respect to the account executive making the transaction on a discretionary basis?

A Yes, I have.

Q What is that opinion?

MR. BARIST: May I have a continuing objection to this line?

THE COURT: Yes.

A I would not let him invest a hundred thousand -- a million dollars, or whatever the total figure was. I would give him permission to only invest one-third.

MR. BARIST: I move to strike everything, a million dollars or whatever it was, as not based on facts in evidence.

MR. SHAFFER: I will accept a third. That is the bottom line.

THE COURT: All right.

MR. SHAFFER: The value of her accounts are in

evidence, your Honor.

THE COURT: All right. Otherwise stricken.
Go ahead.

Q I want you to further assume that on or about May 27, 1969, less than one month after your advice allowing the purchase of one-third of the account, the account executive came back to you on or about May 27 and told you that his signals experienced another abortion and what he thought was a buy signal upon which he should move no longer existed and he wanted to sell that which he had bought. Would you have an opinion as to what your advice to him would be at that time?

MR. BARIST: Objection to the characterization of buy signal aborted, abortion.

THE COURT: That was used at some point during Mr. deGive's testimony, but I don't recall with respect to which transaction. Why don't you use some other word.

Q His signals changed.

MR. BARIST: Your Honor, if I could on this, I believe that Mr. deGive characterized the buy signal he received on or about February 11 as aborting or abortive a week later. I do not believe he used such testimony with respect to the buy signal at the end of

1 April and the sale at the end of May, which is the
2 transaction now the subject of testimony.

3 THE COURT: Do you accept in lieu thereof that
4 his signal changed on that occasion?

5 MR. BARIST: I think the testimony was to the
6 effect that he determined that it was a sell condition.

7 THE COURT: Do you accept that as to the
8 February 18, 1969?

9 MR. BARIST: I am referring, your Honor, only to
10 the May. I have no problems with the February, because he
11 did use the word "aborted."

12 THE COURT: Only to the May.

13 MR. BARIST: A sell signal in May.

14 THE COURT: A sell signal.

15 MR. SHAFFER: You ruled on February. That is in
16 the record.

17 I am going to replace the question for tidiness
18 of the record.

19 THE COURT: Good.

20 Q Mr. McDonald, assume that on May 27, 1969, or
21 shortly before, the account executive again approached
22 you, and assuming all the other factors that I have called
23 to your attention before, he told you that the purchase
24 signal upon which he acted on April 30 had changed to a
25

1
2 sell condition, based upon his technical material, do you
3 have an opinion with respect to what your advice would
4 be to the account executive with respect to his proposed
5 transaction?

6 A Yes, I do.

7 Q What is that opinion?

8 A I would not give permission to sell it at that
9 time. I would rather he wait.

10 Q Your advice to him would be to what?

11 A Not to sell out at that time.

12 Q And to do what?

13 A And to wait and see how the market is going to
14 do.

15 Q I want to ask you whether you have an opinion.
16 Assume that on May 27, at the time of the sale that the
17 account executive wishes to make, you are approached by
18 him for the first time and that prior to this time you
19 had not been consulted by him with respect to your advice
20 on making the purchases on February 11 and making the
21 sales on February 18, and making the purchases on
22 April 30. And you are being consulted by him for the
23 first time with respect to sales on May 27, but he tells
24 you of all these facts. He tells you that on February 11,
25 on a buy signal, he made a major move in the account and

1 bought, and he tells you that on February 18 and shortly
2 thereafter he made a major sale in the account, based upon
3 the technical material which showed him a sale condition;
4 and he tells you, although you had not been specifically
5 informed before, that on April 30 his technical material
6 gave him a buy signal and he bought by making a major move
7 in the account.
8

9 He comes to you now, on May 27, and he tells you these
10 things for the first time and he asks your advice with
11 respect to operating upon his sale conditions that he
12 believes exist in the market and his request to sell a
13 major portion of the account.

14 Do you have an opinion, under those circumstances,
15 as to what your advice to the salesman would be?

16 MR. BARIST: Objection.

17 THE COURT: I will allow it.

18 Q Yes or no.

19 A Was this allowed?

20 Q Yes, it is allowed. Yes or no.

21 A Sorry. I have an opinion.

22 Q What is that opinion?

23 A Being approached the first time, I would have
24 to take the same stand as I did before, that I would have
25 to wait a while. I would not sell at that time.

1 [1028] McDonald - direct A-701
2 Q Going back to the hypothesis that you had been
3 approached on February 11 and you had been approached on
4 February 18 and you had been approached on April 30 and
5 you had been approached on May 27, let us assume that on
6 October 14, 1969, the account executive comes to you and
7 tells you that his signals are indicating to him, based
8 upon his technical material, that the market is reaching
9 a major bottom and that he has a buy signal and he wants
10 to commit approximately \$200,000 to purchases in the
11 customer's account over which he has discretionary
12 authority. Do you have an opinion with respect to this
13 purchase by the salesman and his request that you allow
14 him to do so?

15 MR. BARIST: Objection.

16 THE COURT: Overruled.

17 Q Yes or no.

18 A I have an opinion.

19 Q What is your opinion?

20 A My opinion at that time would be that I would not
21 allow any further purchases in the account until I spoke
22 to the customer personally myself.

23 MR. SHAFFER: Your witness.

24 THE COURT: When you say you would not allow
25 any further purchases in the account until you spoke to

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Q I am Jeff Barist, and, as you gather --

A Could you come up here? I could hear you better.

Q If it is the same with you, sir, all my notes are here. I will try to keep my voice up.

As I said, sir, my name is Jeff Barist. I represent the defendants. You answered a set of hypothetical questions that Mr. Shaffer put to you, sir, based on what Mr. Shaffer described as the customer's investment intent. Do you remember that?

A Yes.

Q Would your answers have been different if what you understood in the hypotheticals to have been the customer's investment intent had been different?

A This is as a discretionary account?

Q Yes.

A No, my answers would not be different, because in a discretionary account you just have certain rules to carry out.

Q Your answer would not have been different if you had been told that the customer wanted the account to be built up?

A In a case like that --

Q Can you answer me yes or no? Would your answer have been different? Yes or no.

1 [1035] A No, it wouldn't be.

2 Q Would your answer have been different if the
3 customer had told the registered representative, if you
4 knew that the customer had told the registered representative
5 to "Get me some good ones"? "Get me some good ones."
6 Would your answer have been different?
7

8 A I don't think so, no.

9 Q Would your answer have been different if you
10 knew that the customer had said over a period of years,
11 "I want to make money"?

12 A I have to ask you to allow me to ask a question,
13 if I may. How would I know the customer said that?

14 Q In Mr. Shaffer's hypothetical how did you know
15 that the customer said, "I want my money nurtured for my
16 old age"? You accepted what Mr. Shaffer said, right, in
17 his hypothetical?

18 A That is true.

19 Q Now I am asking you to accept what I say, and I
20 am simply adding one additional fact. Would your answer
21 to Mr. Shaffer's hypotheticals been different if you knew
22 that the customer had said, "Get me some good ones"? Is
23 the answer yes or no?

24 A No.

25 Q Would your answer to Mr. Shaffer's hypotheticals

1 have been different if you knew that the customer had
2 said over a period of years, "I want to make money"?

3 A With my background, I would say --

4 Q Can you answer that yes or no, sir?

5 A No.

6 THE COURT: Is that "No, I can't answer it"?

7 Q Is it No, you can't answer it or No, your
8 answer wouldn't be different?

9 A My answer wouldn't be different.

10 Q Would your answer to Mr. Shaffer's hypothetical
11 have been different if you knew that over a period of
12 approximately ten years the customer had borrowed hundreds
13 of thousands of dollars for the purpose of purchasing
14 securities?

15 A On the first question, I answered that I would
16 make the complete investment on that basis.

17 Q Let us go to the answer where you said you would
18 make a third investment. Would your answer to that question
19 be different if you knew that over a period of years the
20 customer had borrowed hundreds of thousands of dollars
21 for the purpose of purchasing securities?

22 MR. SHAFFER: I object to the word "third,"
23 Judge.

24 MR. BARIST: That was what the witness said,
25

your Honor.

THE COURT: Would you read it back.

(Question read)

MR. SHAFFER: I only object to the word "third,"
Judge.

MR. BARIST: A third of the account is what the
witness testified to.

THE COURT: The witness being --

MR. BARIST: Mr. McDonald.

MR. SHAFFER: If it is understood that way, I
have no problem.

THE COURT: You can proceed.

Q Understood that way, would your answer have been
different, sir, with that additional information?

A I'd say the same way.

Q Would your answer have been different if the
registered representative in prior years had moved in and,
out of the market with great speed and rapidity, buying
or selling hundreds of thousands of dollars within a
very brief period of time and that this form of transactions
had resulted in, as Mr. Shaffer told you, profits to the
plaintiff, to the customer; would your answer have been
different?

A My answer would not be different, because I

2 would consider the time I am working in, in '69 and '70,
3 yes.

4 Q What is there peculiar about the time?

5 A I think the markets, if I recall, the markets
6 weren't in very good shape.

7 Q They were in terrible shape during that period,
8 is that correct?

9 A Yes.

10 Q As a matter of fact, many people lost hundreds
11 of thousands, if not millions, of dollars in that period
12 of 1969-70, is that correct, sir?

13 A I have no idea --

14 MR. SHAFFER: I object.

15 THE COURT: I will allow it.

16 A I have no idea what the people lost.

17 Q How did the major mutual funds do in that
18 period?

19 MR. SHAFFER: I object to that question. He is
20 not here as --

21 THE COURT: Well, let me check. Did you deal in
22 such stocks, sir, as well, mutuals?

23 THE WITNESS: We bought mutuals and sold them.

24 THE COURT: I will allow it.

25 Q How did the mutual funds do during that period

1 [1039]
2 as an average? Did they make or lose money?

3 A If the market is going down --

4 MR. SHAFFER: I object, your Honor. You just
5 cannot lump the mutuals together. If he wants to take
6 a certain fund, the Dreyfus Funds --

7 THE COURT: The witness can make his own
8 distinction. He has been qualified as an expert.

9 MR. SHAFFER: I have just stated the ground for
10 my objection.

11 THE COURT: Go ahead.

12 A I would say that they lost money.

13 Q By the way, you testified earlier as to your
14 experience in the brokerage business. Is it fair to state
15 that your entire experience in the brokerage business has
16 been in what is known in Wall Street parlance as back
17 office operations, back office?

18 A No, sir.

19 Q Excuse me?

20 A A great deal of my time up to '37 was in back
21 office.

22 Q And after?

23 A After '37 I was in management.

24 Q Were you a customer's man or a registered
25 representative at any point in time?

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A I was.

Q Did you handle accounts?

A I did.

Q Did you advise customers as to the purchase or sale of securities?

A At times.

Q But viewing your career as a whole, is it fair to state that the career of John McDonald on Wall Street has been more in the nature of a back office man than in the nature of a man who advises as to the purchase or sale of securities?

MR. SHAFFER: I object.

A No.

Q That is not a fair statement?

A No. Because when I became a partner in '46 I was in charge of the customer's room, I was in charge of the analysts, and I followed everything on it.

Q Would you describe yourself as an investment advisor?

A No.

Q Would you describe yourself as an investment analyst?

A No.

MR. SHAFFER: I withdraw my objection.

Q Assume that you knew that the plaintiff, that the customer had said she wants her account to be built up, that she had said to her registered representative over a period of years, "Get me some good ones"; that she had said that she wanted to make money; that she had borrowed large sums of money over a period of ten years to purchase or sell securities; that she had taken out a margin account; and that her registered representative over a period of prior years had made hundreds or thousands of dollars for her by the use of his particular method of analysis -- knowing all those facts, would your answer to Mr. Shaffer's hypothetical question still be the same?

MR. SHAFFER: Your Honor, I object; asked and answered except as to margin.

THE COURT: I will allow it.

A My answer would be the same on the first purchases as I made before.

Q On the first purchase?

A Yes, on the first purchase.

Q What about on the April purchase, knowing all those facts, would your answer remain the same?

A My answer would remain the same.

Q Would it remain the same for the May sale?

A The May sale, yes.

Q And the October purchase?

A The October purchase would be no purchase.

Q Would your answer remain the same if the customer instead of being a widow of sixty was a young man of prime age with an income of, let us say, over \$200,000 a year and independently wealthy to the tune of over \$10,000,000 and you further knew that the investor was in the stock market to speculate and to make the greatest amount of money?

MR. SHAFFER: I object, your Honor. Happily my client is not a widow and I also object to the word "tune."

THE COURT: I will allow it.

MR. SHAFFER: How about the widow, Judge?

MR. BARIST: Strike "widow."

THE COURT: I understand the factual situation is not the same.

Q Would your answer still be the same?

A No. In that case I would permit it.

Q That is because you would then --

A His background, his income, his worth, and everything else. I would permit the first purchase.

Q But you would have permitted the first purchase in Mr. Shaffer's hypothetical; right?

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A Yes.

Q And you would have permitted the first sale, the February sale, in Mr. Shaffer's hypothetical?

A That's right.

Q In the hypothetical I just gave you what would you have done with respect to the April purchase?

A The April purchase in the second case, I would permit it.

Q And the May sale, would you have permitted it?

A I would have permitted it, yes.

Q And the October purchase?

A No, I would not permit it.

Q In the second case would you have permitted the October purchase?

A That is the third case.

Q I am talking about the second case.

A Yes.

Q The one with the young rich man.

A I would not permit the October purchase without talking to the customer.

Q Is that because by October you came to the conclusion that, given the state of the market in 1969, this was no time in your judgment to be making large purchases of equity securities?

1 [1044] McDonald - cross A-712
2 A No, I believe I stated a few minutes ago, after
3 the second sale I would like to talk to the customer, not
4 in October.

5 Q I did not say that.

6 A That is my answer to you.

7 Q But I would like you to answer my question.
8 My question is the reason you would not permit, in your
9 words, the October purchase is that you have come to the
10 conclusion that in your judgment this is no time to be
11 purchasing securities?

12 MR. SHAFFER: I object, your Honor.

13 THE COURT: I will allow it.

14 MR. BARIST: Could I have the witness' answer,
15 please?

16 A I would not permit it, because I have -- my
17 feeling would be on the first two purchases he started
18 churning for commissions.

19 MR. BARIST: I move to strike the answer.

20 MR. SHAFFER: Oh, no, Judge, he asked for it,
21 he got it.

22 THE COURT: Yes. Application denied.

23 Q You testified that you would permit only a
24 portion of the April purchase, is that right?

25 A That's right.

1 [1045]
2 Q What would happen if the market went up, let us
3 assume that the market went up, you only allowed a
4 portion of the April purchase --

5 THE COURT: Excuse me, Mr. Barist. Which set of
6 hypothetical circumstances are we now inquiring about?
7 The young man, the plaintiff --

8 MR. BARIST: Let us go back to the plaintiff.

9 THE COURT: Fine. Then we are finished with the
10 young man.

11 MR. SHAFFER: I object to the market going up,
12 because it did not go up and it is not in the case.

13 THE COURT: Restate it.

14 Q Let us assume this: You object to the April
15 purchase and thereafter the market went up.

16 A I didn't object to it. I invested a third.

17 Q Is that because you only wanted to give the
18 registered representative a third of the commissions that
19 he otherwise would have made?

20 A Commissions would not be in my mind. I was only
21 thinking of the customer. If he made a bad deal on the
22 first, on the million dollars, and he didn't want to go
23 in again for another million. That is my feeling.

24 Q When you say your feeling, are you saying it is
25 your business judgment as to what should be done in the

market at a particular point in time?

A No. My judgment there is for the customer.

Q But you are exercising your judgment on behalf of the customer; right?

A That's right. I emphasize my judgment on my house rule. That is what I am emphasizing.

Q What?

A My house rule.

MR. BARIST: I move to strike everything with reference to his house rule. I don't think his house rule has anything to do with this case.

THE COURT: You asked him the basis for his judgment and he answered it. Denied. Whether it is in the case or not, it is in now.

Q If you prevented the full purchase in April and the market went up, the customer would therefore be deprived of making the amount of money which would have been made had you not interfered; is that correct?

A On your theory, yes. If the market went up, naturally he would have made more money if he had a 100 percent investment.

Q In May, on the May sales, you said, "I would have said wait until the market goes down," is that right?

A That is right.

2 Q And you would then wait -- how low was the market
3 in May?

4 A I can't tell you.

5 Q How much more would you have wanted the market
6 to go down before you allowed the registered representative
7 to sell in May?

8 A At that time --

9 Q Could you answer my question, sir?

10 A I can't give you yes or no.

11 Q No, but can you tell me how much more?
12 It is a quantity I am looking for.

13 A At that time I would ask to talk to the customer.
14 The customer I would ask to talk to.

15 Q That is not what you testified to with respect
16 to Mr. Shaffer's hypothetical. You said, "I would have
17 wanted to wait until the market went down some more." I
18 want to know, how much more would you have wanted the
19 market to go down?

20 MR. SHAFFER: I object to the form of the
21 question.

22 THE COURT: Yes. I don't think the answer was,
23 "I would have wanted to wait to see how much more the
24 market went down." It is possible that was his answer,
25 and I did not get it down in my notes properly. "I will

1 tell him to wait and see what the market would do," and
2 my clerk's notes are the same.

3 MR. BARIST: My notes: Not give permission to
4 sell but wait and see how the market does.

5 Q If the market went up, would you have then
6 given him permission to sell?

7 A If the market went up?

8 Q After May.

9 A Well, how much is up?

10 Q I am asking you. You told us you would not give
11 permission to sell but would wait to see how the market
12 does. Were you waiting to see if the market would go up
13 or down?

14 A If the market went up a substantial figure from
15 what it had gone down, I would give permission.

16 Q To sell?

17 A To sell.

18 Q If the market went down, would you give
19 permission to sell?

20 A If he came in, I would discuss with him
21 possibly of buying in at a lower price and averaging up.
22 That would be my opinion.

23 Q Your opinion as to investment decisions?

24 A I would discuss that with him.
25

1 [1049] McDonald - cross A-717
2 Q If the man came to you in May and denied your
3 permission and the market went down, under this set of
4 facts wouldn't your action have cost the customer
5 considerable amounts of money?

6 MR. SHAFFER: I object to the form of the
7 question. I don't know under which hypothetical we are
8 operating.

9 THE COURT: I do, and if the witness does, he
10 can answer the question.

11 THE WITNESS: If the market continued going down
12 after I suggest not selling, he would have lost more
13 money.

14 Q Did you have the customer's discretionary power
15 to trade in the account or did the registered
16 representative?

17 A I had the power --

18 MR. SHAFFER: I object.

19 THE COURT: What is the objection?

20 MR. SHAFFER: My objection is that it is not the
21 proper cross-examination. There has been no hypothetical
22 presented to this gentleman --

23 THE COURT: Sustained.

24 Q Didn't you assume here that the registered
25 representative had a discretionary power over the

customer's account?

A The customer's man has discretionary power over the account.

Q I am just asking you what you are assuming.

A But I, as the operating partner or the managing partner, have control over him. If I think he is doing wrong, it is up to me to stop it.

Q Do you know how much the market went down from May 1969 to October 1969?

A No, I do not.

Q Would approximately 150 points on the Dow Jones refresh your recollection?

MR. SHAFFER: He said he did not know, Judge, so it is not a question of refreshing his recollection.

THE WITNESS: Anything I would say would be a guess here.

THE COURT: He has not been presented here as being knowledgeable about that, so I don't see any point in inquiring about it. If you want to set up hypotheticals of your own as you have been doing, that is all right.

Q You said you would, before you would allow the October purchases, you would talk to the customer?

A Yes, sir.

Q In answering Mr. Shaffer's hypothetical as to

1 the October purchases, you answered you would want to talk
2 to the customer. Would your answer have been any
3 different if you added to the facts Mr. Shaffer gave you
4 the fact that the registered representative had spoken on
5 at least two prior occasions that month to the customer
6 about those very purchases?
7

8 A My answer would not be any different. I'd still
9 want to talk to the customer.

10 Q And if you got to the customer and the customer
11 said, "I have talked about this with my registered
12 representative, he has had my trading power for approximately
13 twenty-eight years, I have confidence in his judgment and
14 I don't know you," what would you have done then?

15 A I would ask the customer to come into my office
16 and give me a written statement to that effect.

17 Q For your legal protection?

18 A That's correct.

19 Q Because they are afraid of being sued by a
20 customer, is that right?

21 MR. SHAFFER: I object to that, your Honor.

22 THE COURT: Sustained.

23 THE WITNESS: Because --

24 THE COURT: Sustained.

25 MR. BARIST: No further questions.

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MR. BARIST: Objection, Judge.

THE COURT: The whole of 69?

MR. SHAFFER: Yes, your Honor.

THE COURT: Sustained.

MR. SHAFFER: 70, lines 24 and 25.

MR. BARIST: It goes over to 71, 2 to 11, to make sense. Is that right?

MR. SHAFFER: Right.

MR. BARIST: I will object to that.

THE COURT: Objection sustained.

MR. SHAFFER: 72, your Honor, 11 to 15.

MR. BARIST: Objection. It is the same line of testimony.

MR. SHAFFER: It is, your Honor.

THE COURT: Objection sustained.

MR. SHAFFER: That is it, Judge.

THE COURT: All right. Now we move to Miss Watson.

MR. SHAFFER: Right.

MR. BARIST: I will turn now to the deposition of Miss Mary Grace Watson.

THE COURT: All right, I have it.

Now you are starting on page 4.

MR. BARIST: After the witness has been called

and identified herself as Miss Mary Grace Watson on page 3, your Honor.

MR. SHAFFER: Line 14.

MR. BARIST: Page 4, line 14.

I should note for the record, your Honor, that on page 4, line 4:

"Question: Could you state your address, please.

"Answer: My personal address?

"Question: Yes.

"Answer: 12 Pleasant Street, Newport, Rhode Island."

I ask permission to read to show the grounds for reading the deposition. The witness is beyond the subpoena limit.

Line 14.

"Question: During the years 1968, 1969 and 1970 were you employed by Mrs. Van Alen?

"Answer: Yes.

"Question: Could you tell us was this full-time or part-time employment?

"Answer: No, that was full time.

"Question: What were your duties during these years?

"Answer: Oh, dear. You really want to hear them

all?

"Question: I am afraid so.

"Answer: Well, of course, I did all the secretary work, invitations, acknowledgments, reminders, regrets, telephone and by hand, personal letters of Mrs. Van Alen and a few of Mr. Van Alen, but they have petered out, very few.

"I kept the ledger with all the accounts, balanced them at the end of the month when the bank statements came, filed under all the headings of various mails from various accounts that came to the Van Alens.

"And at that period, supervised the staff in the house, did all the shopping for the food, planned some meals and details to the -- the staff supervision was very extensive.

"I think I've covered everything."

Page 5, 2 to 24.

I am starting on line 12 now.

"Question: This was at the Van Alen's home?

"Answer: Van Alen's residence.

"Question: In Avalon?

"Answer: Avalon, Ocean Avenue, Newport, Rhode Island.

"Question: Did you travel with the Van Alens

when they moved about?

"Answer: No. Newport is my home.

"Question: The description of your duties that you have just given us for the years '68 through '70, did you perform the same duties for the Van Alens in prior years --

"Answer: Yes.

"Question: -- of your employment?

"Answer: Yes."

Page 6, line 8.

"Question: Did you open mail for the Van Alens?

"Answer: Yes."

MR. SHAFFER: I would like him to read 5 to 7.

THE COURT: Yes. Read that.

MR. SHAFFER: "Were you employed by Mrs. Van Alen, Mr. Van Alen, or both?

"Answer: Well, both."

MR. BARIST: Continuing the questioning:

"Question: Did you open mail for the Van Alens?

"Answer: Yes.

"Question: Did you open all the mail which came into Avalon?

"Answer: When they were away, I opened all the mail, and when they were there, I gave them their personal

mail, you know, anything marked personal.

"Question: If an envelope was not marked personal --

"Answer: I opened it.

"Question: You opened it?

"Answer: Yes.

"Question: So it would only be when an envelope was actually marked personal --

"Answer: And I could tell it was a letter, you know, a friend's letter. You could tell from different stationery.

"Question: But business stationery you would open?

"Answer: I opened."

Page 7, line 2.

"Question: What instructions did Mrs. Van Alen give to you with respect to the business correspondence she received from Dominick & Dominick?

"Answer: Gosh. None. They went to her. She saw them and then they'd go in the files. It wasn't too much."

Page 8, line 3.

"Question: As a matter of your routine practice during the period of 1968 through 1970 -- not in every

instance, but what you generally did -- if the Van Alens were at home and a statement came in from, let us say, Dominick & Dominick, would you show it to the Van Alens before you put it into the files?

"Answer: Yes."

MR. SHAFFER: I would like to read 10 to 25.

THE COURT: All right.

MR. SHAFFER: "Could you describe the file which you ultimately would put the piece of paper into.

"Answer: Could I describe it?

"Question: What did it look like?

"Answer: A folder and I'd put a little index on the top, Dominick & Dominick, and everything went in there.

"Question: Did you personally examine the various documents which came in from Dominick & Dominick?

"Answer: No. No, I did not.

"Question: Did you examine documents which came in from the Bank of New York or from the First National City Bank?

"Answer: Deposits went into my ledger, all their deposit slips, trust funds, and whatnot would all go into -- but not every single activity."

MR. BARIST: Going on to page 44.

MR. SHAFFER: What happened to all the other stuff?

MR. BARIST: I am omitting it. Page 44.

THE COURT: One moment. Line 9?

MR. BARIST: Line 9.

"Question: Did Mrs. Van Alen ever say to you in words or substance, 'Miss Watson, am I making or losing money in these transactions?'

"Answer: Oh, she knew. She knew whether she was making or losing money."

MR. SHAFFER: I would object to that, Judge. How does Miss Watson know whether Mrs. Van Alen -- it is not helpful, it is not probative.

THE COURT: Yes, I agree with that. The answer appearing on lines 12 and 13 is stricken.

MR. BARIST: Could I try to bring it back to your Honor by reading the question at the bottom of 44, which goes on to the top of 45, as follows:

"Question: You just said that Mrs. Van Alen would know whether or not she was making or losing money and wouldn't need you to tell her that. How would she know whether or not she was making money?

"Answer: Because of her conversations with her broker. He'd keep her informed verbally. She talked to him

often."

MR. SHAFFER: That is the same.

MR. BARIST: "Question: About how often?

"Answer: Saw him often. I don't know. But often. I couldn't pin it down. I don't know."

MR. SHAFFER: That is hearsay on hearsay, Judge. That is not helpful either.

THE COURT: Just a moment.

MR. BARIST: May I be heard, your Honor?

THE COURT: Yes, in just a moment.

MR. SHAFFER: May I be heard too?

THE COURT: Just a moment. I propose to sustain plaintiff's objection, Mr. Barist. Why shouldn't I?

MR. BARIST: First, your Honor, it is not a hearsay objection, because it is based on the acts of the plaintiff, and anything that she says or does comes in as admission without a hearsay problem. What we are really talking about here, your Honor, is competence.

THE COURT: Why does it come in as an admission?

MR. BARIST: For example, suppose Mrs. Van Alen told Miss Watson, "I know I am making" --

THE COURT: See if you can jump to the last sentence of the rationale or a word.

MR. BARIST: In a word, it is not hearsay

1 because it is an admission by the plaintiff. What was
2 really at issue here is whether or not Miss Watson has
3 the competence to know whether or not Mrs. Van Alen knew.
4

5 THE COURT: Why should I receive her observation
6 as to what Mrs. Van Alen knew or did not know, and why
7 should I accept the material on page 45 referring to
8 conversations with her broker, seeing him often, there
9 being no foundation laid that she ever heard those
10 converations or saw them meet?

11 MR. BARIST: With respect to the lack of a
12 foundation, I think I have established that this woman is
13 Mrs. Van Alen's secretary, comes to the house every day.

14 THE COURT: Indeed. Not disputed, I daresay.

15 MR. BARIST: And I think that is a sufficient
16 foundation to lay a witness' observation that her
17 employer, who she sees every day, spoke to her broker
18 frequently and saw him frequently.

19 THE COURT: Objection sustained. Next?

20 MR. BARIST: Page 48, line 9.

21 THE COURT: Yes?

22 MR. BARIST: "Could you tell us a little
23 something about yourself? You graduated from high school,
24 of course?

25 "Answer: Yes.

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"Question: Did you attend college?

"Answer: Yes.

"Question: Did you receive a degree from college?

"Answer: Yes.

"Question: Could you tell us what --

"Answer: Just a BA.

"Question: BA?

"Answer: Yes.

"Question: From what college?

"Answer: Trinity in Washington.

"Question: That was a number of years ago?

"Answer: It certainly was. I don't like to remember that far back. That was long before I knew the Van Alens.

"Question: After you graduated from Trinity, did you work?"

MR. SHAFER: Let us stop there. All of that I object to.

THE COURT: All of what? All that follows?

MR. SHAFFER: No, everything that he read, on 48.

THE COURT: No, I will take it.

MR. BARIST: Continuing on 49.

"Answer: Yes, I was very interested in accounting, and I worked for the City of Newport in the finance department, took care of balancing -- getting the trial balances on the big accounts.

"Question: How long did you work as an accountant?

"Answer: Oh, let me see. I worked in another office in city hall. Oh, I don't know. I don't know how many years, but more than five."

MR. SHAFFER: I object. Not probative.

MR. BARIST: Your Honor --

THE COURT: I will take it.

MR. BARIST: May I point out that Mrs. Van Alen --

THE COURT: It suffices to go from lines 2 to 6 on page 49, and then to pick up the answers -- or, rather, the lines 10 and 11, omitting 7 through 9.

MR. BARIST: I have nothing further.

MR. SHAFFER: I will see if I can shorten it too, Judge. We go to page 16 of the deposition of Mary Grace Watson. If I could just look at it a minute, your Honor, I will tell you whether I abandon it.

THE COURT: I gather that whatever appears on pages preceding 16 you are withdrawing?

MR. SHAFFER: We have covered them.

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THE COURT: Or covered.

MR. SHAFFER: They have been covered.

THE COURT: All right.

MR. SHAFFER: I will read it.

"Question: You suggested" --

MR. BARIST: I object. Beyond the scope.

MR. SHAFFER: She is an accountant, Judge, so she is preparing lists.

THE COURT: Excuse me. I am way behind you. Just a moment.

What page were you on?

MR. SHAFFER: 16, your Honor, lines 7 to 25.

THE COURT: And there is an objection.

MR. SHAFFER: Particularly line 16 and line 17.

THE COURT: Why should it not be received, Mr. Barist?

MR. BARIST: Beyond the scope.

MR. SHAFFER: He is trying to show, Judge, my --

THE COURT: There is much that has been listed about her keeping -- first of all, what were your duties, she was asked, and she described them. Then you went into her background, no doubt to show what her background was in relation to the performance of those duties. Here she is being asked more particularly about some of those duties.

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2 If you mean you did not ask her these questions, that is
3 true, but I think it is within the scope.

4 MR. BARIST: If your Honor please, then under
5 your Honor's ruling I think that it would be proper up to
6 line 17, but the question beginning on line 18, it seems to
7 me is irrelevant.

8 THE COURT: Yes. So I will rule that page 16,
9 lines 7 through 17, are in.

10 MR. SHAFFER: All right, Judge.

11 THE COURT: Objection is overruled.

12 As to the other --

13 MR. SHAFFER: Shall I read them?

14 THE COURT: No. Lines 18 -- oh, if you have not,
15 yes.

16 MR. SHAFFER: Yes.

17 "Question: You suggested to her that you prepare
18 this list?

19 "Answer: No. I said, 'If you like, I'll make
20 you a list.'

21 "Question: What did she --

22 "Answer: She didn't ask me to.

23 "Question: You volunteered?

24 "Answer: I volunteered. Maybe I had a little
25

1
2 time" --

3 MR. BARIST: I move to strike anything after
4 "I volunteered" as not responsive.

5 THE COURT: It is not important. Go ahead,
6 read it.

7 MR. SHAFFER: "I volunteered. Maybe I had a
8 little time on my hands. Because I didn't ordinarily do
9 that.

10 "Question: After you sent the list to Mrs.
11 Van Alen, did you have any conversations with her about
12 the list?

13 "Answer: None whatsoever. She didn't discuss
14 it. She didn't discuss her business much with me."

15 THE COURT: Objection as to the rest is
16 sustained.

17 MR. SHAFFER: I won't read the rest.

18 Your Honor, 17, lines 2 to 25.

19 THE COURT: You mean line 4?

20 MR. SHAFFER: Yes, your Honor.

21 THE COURT: "Did you ever"?

22 MR. SHAFFER: Yes, your Honor.

23 MR. BARIST: Objection as beyond the scope.
24 Once your Honor has struck out my attempt to get in her
25 knowledge of what Mrs. Van Alen knew from Mr. deGive, it

seems to me --

MR. SHAFFER: All right, your Honor, we withdraw.

Page 18, 2 to 25.

MR. BARIST: There is no question beginning on 2.

MR. SHAFFER: Yes, but it is a continuation.

We withdraw it, Judge.

Page 19, lines 3 to 9. That is a continuation, your Honor, so we withdraw it.

23 to 25?

MR. BARIST: Page 19, lines 23 to 25?

MR. SHAFFER: Your Honor, can we go back to page 18, starting on line 22, with the question:

"Question: If the Van Alens were traveling" -- and then read through line 9, on page 19?

MR. BARIST: No objection.

THE COURT: All right.

MR. SHAFFER: "If the Van Alens were traveling as you said they did constantly, what did you do with correspondence from Dominick & Dominick?

"Answer: When you say correspondence, do you mean those activity slips?

"Question: Right, yes.

"Answer: That's all that ever came. No letters

1
2 ever came.

3 "Question: Right.

4 "Answer: I put them together pending her
5 return because we lost mail sending it abroad.

6 "Question: Do you know if you ever forwarded mail
7 to her?

8 "Answer: Not that type, no."

9 THE COURT: Just for sheer accuracy, line 6:
10 "I put them all together."

11 MR. SHAFFER: All right, Judge, I'm sorry.

12 THE COURT: Next?

13 MR. SHAFFER: Page 28, your Honor, and it is
14 lines 3 to 6.

15 I withdraw it. 19 to 25.

16 MR. BARIST: Objection.

17 MR. SHAFFER: I withdraw it.

18 THE COURT: What did you say?

19 MR. SHAFFER: I withdraw it.

20 THE COURT: All right.

21 MR. SHAFFER: 29, 2 to 11.

22 MR. BARIST: Objection.

23 MR. SHAFFER: No, we want this, Judge. Very
24 relevant.

25 MR. BARIST: It may be relevant, but it is hearsay,

1
2 which I am allowed to get out of a deposition because it
3 may lead to evidence. The offer is lines 2 through 11 on
4 page 29.

5 MR. SHAFFER: Right. And circumstantially,
6 your Honor, not assertively.

7 Your Honor, we have to start on page 28, I am
8 sorry.

9 THE COURT: At?

10 MR. SHAFFER: Line 19.

11 THE COURT: Objection sustained.

12 MR. SHAFFER: Page 43, Judge, lines 5 to 25.

13 We withdraw it.

14 Page 44, your Honor, 2 to 8 -- we withdraw it.

15 Page 47, 12 to 18. No, we withdraw it, Judge.

16 Thank you.

17 THE COURT: Does that conclude all of this, or
18 is there more?

19 MR. SHAFFER: Yes, that completes all of it.

20 THE COURT: All right. I am told there are
21 written objections handed up by Mr. Barist with respect to
22 Mitchell.

23 MR. BARIST: That is correct, your Honor.

24 THE COURT: And that would be 246A and 246B would
25 be the designation and the excerpts respectively, and

"Answer: Thomas H. Mitchell."

Page 3, lines 21 to 24.

"Question: What was your most recent occupation?"

"Answer: Director of compliance for Dominick &
Dominick.

"Question: When did you leave that employment?"

"Answer: October 1, 1971."

Page 7, 17 to 22.

"Question: Do you recall that Dominick was
incorporated about 1964?"

"Answer: Yes, I do.

"Question: And you became a vice-president after
it was incorporated?"

"Answer: Right."

THE COURT: Excuse me. Where did that begin?
Page 7, line what?

MR. SHAFFER: It began on line 17.

THE COURT: All right.

MR. SHAFFER: Page 8, line 3 to line 16.

"Question: Then what position were you given?"

"Answer: I became director of training, training
program.

"Question: How long did you remain the director
of the training program?"

"Answer: Until January of 1969."

MR. BARIST: Could we have the next question and answer?

MR. SHAFFER: Yes. I am going down to line 16.

MR. BARIST: I would like to have line 8.

MR. SHAFFER: Yes. I am going to continue.

"Question: Then what position did you have?

"Answer: Then I became director of compliance.

"Question: Who appointed you as director of compliance?

"Answer: Mr. Rockefeller.

"Question: How was your appointment made? In writing?

"Answer: It eventually came out in writing, yes.

"Question: But first Mr. Rockefeller told you that you would be the director of compliance?

"Answer: Right."

I would like to read the next two lines.

"Question: Did he say anything else to you at that time?

"Answer: Not that I recall, no."

Page 13, your Honor, lines 2 to 25, which is the whole page.

MR. BARIST: Could I have the next two lines on page 8, Mr. Shaffer?

MR. SHAFFER: No objection.

"Question: In an effort to jog your memory: Did he just say to you, 'Tom, you are the director of compliance,' and walk away?

"Answer: No."

MR. BARIST: "I had been" --

MR. SHAFFER: "I had been in Los Angeles for four months.

"Question: Working for Dominick?

"Answer: Working for Dominick."

Now I would like to go to page 13, your Honor, and read the whole page.

"Question: Did you ever read the rules of the New York Stock Exchange?

"Answer: Yes.

"Question: Are you familiar with them?

"Answer: I believe so, yes.

"Question: Was it your duty, as director of compliance, to insure that the employees of Dominick & Dominick itself complied with the rules of the stock exchange?

"Answer: Yes.

"Question: Was it part of your duties as director of compliance in 1969 to supervise or control the activities of Paul deGive?

"Answer: Yes.

"Question: Did you do anything to supervise or control deGive's activities?

"Answer: I or one of my assistants would review all his transactions, just as we did every other salesman's transactions.

"Question: How often were those transactions reviewed?

"Answer: Every day.

"Question: How was that accomplished?

"Answer: There were two ways. One, you got copies of all the confirmations; and secondly, you got an IBM run of transactions by salesmen."

Page 14, I would like to read the whole page.

"Question: The copies of the confirmations, are those for the trades done during the course of that day or the previous day?

"Answer: No, the previous day.

"Question: And the IBM run of transactions by salesmen --

"Answer: The same.

"Question: For the previous day?

"Answer: Previous day, right.

"Question: And was it your practice to look at all of his confirmations?

"Answer: Either I did or one of my assistants did, yes."

MR. BARIST: In the interests of accuracy, I think the question was: "And it was your practice to look at all of his confirmations?"

MR. SHAFFER: "Answer: Either I did or one of my assistants did, yes.

"Question: Also to look at the run. Now, what was on this run, the IBM run?

"Answer: The IBM run would show the account number, the -- you could tell by the minus or not a minus whether it was a sale or -- purchase or sale, the number of shares, the name of the stock, and then a lot of little other figures which were for control in the cage, and things of that sort, which I don't know, really, what they meant, but we weren't really interested in this.

"Question: When you looked at an account number did you know the name of the account?"

Next page, 18 to 25.

MR. BARIST: Excuse me. Page?

MR. SHAFFER: I will read the answer:

"Answer: No. But you knew that when you looked at the confirmation. That was the same copy the customer got, and showed the name."

On page 15, lines 18 to 25.

"Question: Did you do anything else to supervise or control Mr. deGive's activities, other than look at the sales confirmation and the IBM run?

"Answer: No, I would not say so.

"Question: Did you ever find that something that Mr. deGive was doing required you to ask him any questions, in the year 1969?

"Answer: Not that I can recall."

Page 16, lines 2 to 24, your Honor, which is bottom of the page.

"Question: Or in 1970?

"Answer: No.

"Mr. Barist: The answer was no?

"The Witness: 'No.'

"Question: Were you the person designated by Dominick to learn facts relative to Candace Van Alen in her capacity as a customer?

"Answer: Will you please repeat that?

"Question: Were you the person designated by

Dominick to learn any facts relative to Candace Van Alen in the capacity of a customer?

"Answer: No, I was not.

"Question: Were you the person designated by Dominick to learn any facts relative to each order to buy or sell in Candace Van Alen's account in Dominick?

"Answer: I don't understand was I the person what?

"Question: The person designed by Dominick to learn any facts relative to each order to buy or sell in Candace Van Alen's account at Dominick.

"Answer: I'm afraid I don't understand what you are getting at. I don't understand that.

"Question: I would like you to look at --

"Mr. Kamerman: Excuse me a minute. I'll be right back."

Next page, 17, lines 4 to 25.

"Question: I would like" --

MR. BARIST: Excuse me. May I have, on 17, lines 4 through 17.

MR. SHAFER: Let us get there and then his Honor will rule.

THE COURT: Let us see now.

MR. SHAFER: We are agreed on 4 to 17, Judge.

1 THE COURT: All right.

2 MR. SHAFFER: "Question: I would like you to
3 look at paragraph 1 of Rule 405 (handing to the witness).
4

5 "Answer: Yes?

6 "Question: Now, my questions were really
7 addressed to this rule, which requires, as I understand
8 it, a stock exchange firm to designate some person to
9 use due diligence to learn essential facts relative to
10 a customer, relative to every order and every cash or
11 margin account, and every person holding a power of
12 attorney.

13 "Answer: You're asking me was I the person?

14 "Question: Yes.

15 "Answer: I would say I would have to be, yes.

16 "Question: Who designated you?

17 "Answer: That would go along when I was made
18 director of compliance.

19 "Question: In other words, you understood that
20 that was part of your job.

21 "Answer: Certainly.

22 "Question: Isn't it specifically said that you
23 must see to it" --

24 MR. BARIST: "It wasn't specifically said."

25 MR. SHAFFER: "It wasn't specifically said that

you must see to it that Rule 405 is complied with.

"Answer: No, I was not specifically -- it wasn't specifically said."

Page 18, lines 2 to 25.

"Question: All right. That is all right.

"Answer: Yes.

"Question: Did you do anything to learn any facts relative to Mrs. Van Alen's account at Dominick?

"Answer: No.

"Question: Did you do anything to learn any facts about any buy or sell order in Mrs. Van Alen's account in 1969 or 1970?

"Answer: Just the normal review that I would do in any transaction.

"Question: That would be to look at the confirmation slip the day after the transaction?

"Answer: Yes.

"Question: When you looked at that slip, what were you looking for?

"Answer: Well, in certain cases you were looking for blue sky, making sure they weren't doing business -- say if a salesman in New York all of a sudden was doing business with a customer in Idaho, you would check to make sure that he was registered in the State of Idaho.

1 "Question: Yes?

2
3 "Answer: You would also look for -- not on the
4 ticket but mainly on the IBM run -- an inordinate amount
5 of buying in a speculative stock, or something of that
6 sort."

7 Page 19, 2 to 18.

8 "Question: What do you mean by 'something of
9 that sort'?

10 "Answer: Anything out of the ordinary.

11 "Question: How did you know what was ordinary?

12 "Answer: Anything that struck you as out of the
13 ordinary you would bring to the attention of the manager,
14 or supervisor, and find out what the story was. And if
15 you saw a tremendous amount of buying in a stock you
16 weren't familiar with, you would check with the research
17 department to see if the salesman doing the buying or
18 selling checked with the research department and knew what
19 he was doing. It was just, as I say, anything out of the
20 ordinary.

21 "Question: Were you looking at the volume of
22 trading in any one account?

23 "Answer: No."

24 That is it, your Honor.

25 Page 20 -- excuse me, your Honor, back on

page 19, at the bottom, two lines.

"Question: Did you do anything to learn any facts relative to Mrs. Van Alen's cash or margin accounts carried by Dominick?

"Answer: Did I do anything what?

"Question: To learn any facts relating to Mrs. Van Alen's cash or margin accounts at Dominick.

"Answer: No.

"Question: Did you know that Mr. deGive had a discretionary power over Mrs. Van Alen's custody account at the Bank of New York in 1969?

"Answer: I believe I did.

"Question: How did you learn that?

"Answer: I don't believe I learned specifically about Mrs. Van Alen's account. I understood that about most -- quite a few of his accounts. So, from that, I just sort of assumed that Mrs. Van Alen's was.

"Question: What you learned was that many of deGive's accounts were custody accounts elsewhere and he had discretionary power over them, is that it?

"Answer: No.

"Question: Then what was it that you learned?

"Answer: I knew that quite a few of his accounts were discretionary accounts.

"Question: But I asked you whether you knew that he had discretionary power over Mrs. Van Alen's account at the Bank of New York in 1969."

Page 21, lines 2 to 9.

"Answer: No, I didn't know that.

"Question: Did you know that Mr. deGive had discretionary power in 1969 and 1970 over Mrs. Van Alen's custody account at the First National City Bank?

"Answer: No.

"Question: Did you know how many accounts in 1969 Mr. deGive was using to trade for Mrs. Van Alen?

"Answer: No."

Page 21, your Honor. I am going back to page 21, lines 14 to 25.

MR. BARIST: I am going to object to that, your Honor.

THE COURT: I will take it for his state of mind.

MR. SHAFFER: "Question: What does 'churning' mean to you?

"Mr. Barist: Objection. I don't think the witness has to be" --

THE COURT: We don't have to have his objections again. Just Q and A.

MR. SHAFFER: All right. Page 22, line 3.

"Answer: What my definition of 'churning' is?

"Question: Yes.

"Answer: It's a pretty broad definition. Any excessive activity in an account in relation to the size of the account and in relation to the individual involved."

I am going to read the balance of the page, your Honor.

"Question: Did you take any steps in 1969 or 1970 to see whether churning was taking place in Mrs. Van Alen's account at Dominick?

"Answer: Not other than the ordinary review of the transactions, daily transactions.

"Question: The only thing that you did was to look at the confirmation slips and the IBM runs?

"Answer: Yes.

"Question: Could you tell from that, or would that show you, if churning was taking place?

"Answer: Yes.

"Question: How?

"Answer: Well, for instance, one day, if you say an account, say, buying General Motors and next day selling it and next day buying it and then selling it, that might indicate churning.

"Question: Did you make a written record of

what the transactions were?"

Page 23, 2 to 14.

"Answer: No. But you could remember.

"Question: But you didn't make a written record?

"Answer: No.

"Question: Is that the only step that you took to prevent churning in Mrs. Van Alen's account?

"Answer: Well, I didn't say there was churning in Mrs. Van Alen's account.

"Question: No, I say to prevent it from churning.

"Answer: Yes, it would have been.

"Question: Do you know what the purpose, stated purpose, of Mrs. Van Alen's investment through Dominick was?

"Answer: No."

Page 26, your Honor, lines 6 through 20.

"Question: Are you aware that the stock exchange has a rule which requires that every order entered on a discretionary basis by a member or employee of a member organization must be identified as discretionary on the order at the time of entry?

"Answer: Yes.

"Question: Did you take any steps to see that

that rule was complied with by Dominick in 1969?

"Answer: We had started taking steps. We were having all discretionary accounts programmed a certain way so that we knew which accounts were discretionary accounts. But I'm not sure when. I think it was 1969.

"Question: Who was the 'we' you referred to, when you said, 'We started taking steps'?

"Answer: The programming department."

Page 27, your Honor, lines 5 through 25.

"Question: Prior to the time that Dominick started this program to identify discretionary accounts, was there any method of identifying discretionary accounts, as far as you were concerned, in your day-to-day work?

"Answer: Not really.

"Question: Is it fair to say that prior to the time that this program was begun, this rule was not observed by Dominick as far as you know?

"Answer: I would say it was observed in quite a few cases. I'm not going to say it was observed 100 percent.

"Question: So far as you know, was it observed?

"Answer: In quite a few cases, yes.

"Question: In which cases?

"Answer: In the majority of the cases of

discretionary accounts in the investment advisory department.

"Question: How do you know that?

"Answer: I know it because they had very strict procedures in there, and it was just a form of habit. They could always go in and get them approved."

Page 28, lines 2 to 13.

"Question: Whom did you speak to there that told you that?"

MR. BARIST: Objection to this, your Honor.

MR. SHAFFER: State of mind, your Honor.

THE COURT: Sustained.

MR. SHAFFER: Page 28, lines 16 to 25.

MR. BARIST: Objection.

MR. SHAFFER: Same ruling, Judge?

THE COURT: Same.

MR. SHAFFER: Page 29, lines 2 to 5.

MR. BARIST: Objection.

MR. SHAFFER: You have to go back to the bottom of page 28, Judge.

MR. BARIST: A continuation of the same testimony.

THE COURT: I will take that.

MR. SHAFFER: May I go back to the page before?

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THE COURT: Yes.

MR. SHAFFER: "Question: He handles discretionary accounts?" -- can we get his name, your Honor.

THE COURT: I guess you had better pick it up from --

MR. SHAFFER: 16.

THE COURT: Yes, 16.

MR. SHAFFER: "Question: Do you know another person in Dominick who told you this?"

MR. BARIST: Objection.

THE COURT: No. Go ahead.

MR. SHAFFER: "Question: Do you know another person in Dominick who told you this?"

"Answer: William Taylor.

"Question: How do you spell Taylor?

"Answer: T-a-y-l-o-r.

"Question: And he is in the investment advisory department?

"Answer: Yes.

"Question: He handles discretionary accounts?

"Answer: He handles discretionary accounts and persons under him handle discretionary accounts.

"Question: When did he tell you that?

"Answer: I saw him do it, and I saw the written

procedures to do it.

"Question: Describe the written procedures.

"Answer: Dominick's procedure in the investment advisory field is rather irrelevant" -- oh, that is an objection.

THE COURT: Strike that.

MR. SHAFFER: Page 30, line 19.

MR. BARIST: Objection.

MR. SHAFFER: It is continuing the thing after the colloquy, Judge.

MR. BARIST: What I am doing, Judge, is I am objecting to it on the grounds of relevancy, the procedures in the investment advisory department.

MR. SHAFFER: That is what he testified to before, your Honor, where the procedures were very strict.

THE COURT: Overruled.

MR. SHAFFER: "Could you describe the procedures followed in the investment advisory department to comply with discretionary accounts on each order.

"Answer: They would generally be taken to an officer or someone so designated and initialed.

"Question: You never looked at the order tickets, did you?

"Answer: No."

I want to read the whole page.

"All you can do is put out procedures. You can't stand over every individual, every order, eight hours a day.

"Question: Was this a procedure which salesmen were required to follow by Dominick as a matter of its policy in 1969?

"Answer: It was.

"Question: How did you know about that policy?

"Answer: It's a rule of the New York Stock Exchange. It's also written in the firm policy manual.

"Question: And this firm policy manual, how many pages does it contain?

"Answer: About 250, I believe.

"Question: Is it given to each salesman?

"Answer: Yes.

"Question: When did Dominick begin to give this manual to each salesman?

"Answer: Oh, I would say 1962.

"Question: Are you aware that there is a stock exchange rule which requires that discretionary accounts shall receive frequent appropriate supervisory reviews by a member or allied member who is not exercising the

discretionary authority?"

Page 32, Judge, lines 2 to 9.

"Answer: I am.

"Question: Did you do anything to enforce that rule in the case of Mrs. Van Alen's discretionary accounts?

"Answer: No.

"Question: Was it your responsibility to do anything in connection with the enforcement of that rule?

"Answer: It was my responsibility for the enforcement of every rule."

Page 33, lines 4 to 12.

"Question: Did you ever discuss the policy manual with Mr. deGive?

"Answer: No.

"Question: Did you have any discussions with Mr. deGive in 1969 at all?

"Answer: Well, I had lunch with him, or something like that."

Page 35, lines 7 to 15. Line 6.

"Question: What was the nature of that discussion?

"Answer: Well, they just -- Mr. Barist just discussed with me that I was to be the one who was designated as the one that was responsible for supervision."

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THE COURT: What page?

MR. SHAFFER: Page 35.

THE COURT: Line? Line 6?

MR. SHAFFER: Line 10.

"Question: Did he tell you that?

"Answer: He discussed it with me. And I
agreed with him completely that I was the one.

"Question: Was there anything else said at
the conversation?

"Answer: No, not really."

Page 37, lines 4 to 22.

"Question: Mr. Mitchell, you and I met for the
first time in the early -- late winter or early spring of
1972, approximately.

"Answer: Something like that.

"Question: Would it refresh your recollection" --

THE COURT: This is examination by Mr. Barist?

MR. SHAFFER: Right.

THE COURT: All right.

MR. SHAFFER: Excuse me, Judge. "Examination
by Mr. Barist."

THE COURT: All right.

MR. SHAFFER: "Question: Mr. Mitchell, you and
I met for the first time in the early -- late winter or

early spring of 1972, approximately.

"Answer: Something like that.

"Question: Would it refresh your recollection if I said that I came to talk to you about interrogatories which had just been served by Mr. Kamerman on Dominick & Dominick?

"Answer: That's right.

"Question: Is it correct to say that at that time I told you that I had talked to my clients and that I was preparing certain drafts of interrogatories, but since you had been named in them I wanted to make sure that you agreed with the information that I had received?

"Answer: Right.

"Question: Did we discuss in general terms your role as director of compliance at Dominick & Dominick?

"Answer: I believe we did."

Page 38, lines 23 through 25.

"Question: Had you ever heard the name Van Alen before you became director of compliance?

"Answer: Yes."

Page 39, lines 2 to 19.

"Question: Did you know anything about Mr. Van Alen or Mrs. Van Alen?

"Answer: I just happened to be a tennis fan,

so that I knew it from that.

"Question: You knew Mr. Van Alen's name from that?

"Answer: Yes.

"Question: Did you know anything about the financial position of the Van Alen family, just as general knowledge?

"Answer: Generally, yes.

"Question: What was your understanding of the Van Alen's financial position, in general terms?

"Answer: Well, they were quite well off.

"Question: Did you know whether or not Mrs. Van Alen in 1969 was a new or an old account of Mr. deGive's?

"Answer: I had seen the transactions -- I had seen, you know, confirmations for quite a while, so that I knew it had been around the firm quite a while.

"Question: Now, you had known Mr. deGive in 1969 for ten or eleven years, is that also correct?

"Answer: I didn't know him when I was uptown, so I probably -- I could say I knew about eight years in 1960."

MR. BARIST: '69.

MR. SHAFFER: "1969.

"During the course of your business association with Mr. deGive had you gotten to know what his" --
page 40 -- "general approach to investment in the stock market was?

"Answer: Yes.

"Question: Could you tell us what you understood to be Mr. deGive's approach, in just general terms? Mr. deGive's approach, as you understood it in 1969 and 1970, can it be characterized by a phrase or descriptive word?

"Answer: I think his approach was a technical approach."

Page 42, lines 5 to 15.

"Question: Sir, do you have any reason to believe that, prior to 1969, Mr. deGive -- well, let me ask you this: When you became director of compliance in 1969, did you at that time have any reason to believe that Mr. deGive had at any time been censured, reprimanded or in any way reviewed by any regulatory agency?

"Answer: No.

"Question: At that time did you have any knowledge of any complaint ever made against Mr. deGive by anyone, including a customer?

"Answer: No."

Page 42, line 25.

"Question: Now as director of compliance in 1969" -- page 43 -- "did you make it your business to concern yourself with the general reputation, character and integrity of the people whom you were to supervise?"

"Answer: Yes."

"Question: Did you have any knowledge in 1969 as to Mr. deGive's reputation in the financial community for character and integrity?"

"Answer: Yes."

"Question: What was that reputation, sir?"

"Answer: The highest."

MR. BARIST: May we have the rest of page 43 read?

MR. SHAFER: Yes, I designated 2 to 22.

"Question: Now, sir, you reviewed Mrs. Van Alen's confirmations for the period January 1969 through 1970?"

"Answer: Yes."

"Question: On a day-to-day basis?"

"Answer: Yes."

"Question: Was there anything which occurred in Mrs. Van Alen's account which led you at that time to believe that there was anything improper happening in her account?"

"Answer: No."

Page 44, lines 18 to 25.

"Question: Now, I believe you said that you knew something about the Van Alens financial position and that your knowledge was that they were quite well off. Is that correct?

"Answer: I don't know anything about anybody's financial position, but I just assumed they were.

"Question: On the basis of what did you assume that?

"Answer: I could assume on what I read in the newspapers" -- page 45 -- "and also the size of their activity in their account, and the size of their account.

"Question: What was the size of their account?

"Answer: I don't know the exact dollar value.

"Question: Approximately.

"Answer: I have no idea of it.

"Question: Did you ever look to see if they owed Dominick any money?

"Answer: No.

"Question: -- during the period that you were there?

"Answer: No.

"Question: Did you ever check to see if the Van Alens owed money to any banks in 1969?

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"Answer: No.

"Question: Or 1970.

"Answer: No."

Page 49, lines 6 through 25. Well, I am going to read from line 5, Judge.

"Question: What does it mean to you?"

MR. BARIST: Excuse me, from what line are you reading?

MR. SHAFFER: 4.

MR. BARIST: On what page are you, sir?

MR. SHAFFER: I am sorry. I belong on page 49. And I would like to read lines 6 through 25.

"Question: How many such accounts did he have?

"Answer: I don't know, really, how many he had. I think maybe he had twenty-five active accounts.

"Question: Were they all discretionary?

"Answer: I don't know.

"Question: Were any of them discretionary?

"Answer: I think most of them were. I don't know.

"Question: Did you look to see if -- when you saw this pattern of selling or buying, did you look to see how it affected the individual account?

"Answer: No.

1 compliance.

2
3 "Question: What did you say to him?

4 "Answer: I stipulated at that time that an.
5 official announcement had to go out as to what my
6 official responsibilities were, which he did put out the
7 next week or in a few days."

8 Going to page 14. That was read on Mr. Shaffer's
9 reading.

10 Page 15. Read by Mr. Shaffer also.

11 Turning to page 37, line 23.

12 "Question: Mr. Mitchell, the IBM runs and
13 confirmation slips which you had received daily showing the
14 previous day's trading, would those records show to you
15 the volume of trading in a particular account, either the
16 number of issues, number of shares?

17 "Answer: In a specific account?

18 "Question: Yes.

19 "Answer: Yes, it would.

20 "Question: Turning your attention -- and this
21 is true for the period -- your answer is true for the
22 period 1969 and 1970?

23 "Answer: Right."

24 Page 39, line 20 -- that has been read by Mr.
25 Shaffer.

Beginning on line 24 it was not, on page 39.

"Question: During the course of your business association with Mr. deGive had you gotten to know what his general approach to investment in the stock market was?

"Answer: Yes.

"Question: Could you tell us what you understood to be Mr. deGive's approach, in just general terms?"

MR. SHAFFER: I read it, Judge.

MR. BARIST: I am going to read it:

"Mr. deGive's approach, as you understood it in 1969 and 1970, can it be characterized by a phrase or descriptive word?

"Answer: I think his approach was a technical approach.

"Question: Do you know how long Mr. deGive had been following that technical approach to the stock market?

"Answer: Well, ever since I had been at Dominick.

"Question: Did you know that Mr. deGive wrote a market letter?

"Answer: Right.

"Question: Was this market letter a technical

approach to the market?

"Answer: Right.

"Question: Had he ever lectured, in your presence, on a technical approach to the market?

"Answer: Yes.

"Question: Now, sir, in reviewing the IBM runs, would these IBM runs be by account or issue or by salesman, or what?

"Answer: By salesman."

Page 41, line 2.

"Question: So that you would get, let's say, on January -- let's say January 3 you would get an IBM run showing all of Mr. deGive's transactions for January 2?

"Answer: Right.

"Question: In the course of 1969 through the beginning months, let's say April of 1970, you would receive these daily runs for deGive?

"Answer: Right.

"Question: Do you remember a pattern appearing in terms of the transactions which Mr. deGive handled in that period?

"Answer: Well, by looking at the IBM runs, you could see a pattern in Mr. deGive's trading, because he was generally all selling or all buying, and it was

contrary to the general salesmen, who would be a mixture, you might say.

"Question: Did it ever come to your attention, reviewing either Mrs. Van Alen's account confirmations or Mr. deGive's IBM runs, that Mr. deGive was buying for one account when he was selling for another?

"Answer: No."

Page 42, line 18. That has been read.

Page 47, line 6.

"Question: Did you read the market letter?

"Answer: Yes.

"Question: Each week or so, as it came out?

"Answer: Just like I read any other publication that came out."

Page 48, line 2.

"Question: Do you know whether he ever lectured to the public on his technical approach?

"Answer: He visited institutions at the request of institutions.

"Question: What kind of institutions?

"Answer: Financial institutions, insurance companies, mutual funds.

"Question: Now, you were asked whether you remembered a pattern appearing in terms of the transactions

1 handled by Mr. deGive in 1969. What was your answer
2 to that, again?

3 "Answer: I said that you could see patterns
4 in his buying or selling, contrary to the general
5 salesman who was usually buying and selling. He was
6 either selling completely or buying completely.

7 "Question: How could you see that pattern?

8 "Answer: On your IBM runs.

9 "Question: And what --

10 "Answer: It indicated what was the sale and
11 what was the buy.

12 "Question: Am I to understand that Mr. deGive's
13 IBM runs would show all sales on a certain day or all
14 purchases on a certain day?

15 "Answer: Yes, they certainly would."

16 Continuing on page 49.

17 "What I am saying is that it would show a
18 pattern, that he was either buying or selling; and he
19 generally -- when he would do it, he would do it in all
20 of his accounts, he would sell completely.

21 "Question: How many such accounts did he have?

22 "Answer: I don't know, really, how many he
23 had. I think maybe he had twenty-five active accounts."

24 MR. SHAFFER: Can we read the next two lines?
25

MR. BARIST: "Were they all discretionary?"

"Answer: I don't know."

Page 51, line 13.

"Question: When you looked at these IBM runs for other salesmen for the same days, you observed that they were both buying and selling, as compared with Mr. deGive, whose action was uniform; is that correct?"

"Answer: It was and it wasn't. I don't think you understand what I'm getting at."

"Question: Explain it."

"Answer: When Mr. deGive would buy or sell, he would completely sell out all his accounts, or the majority of his accounts."

"Question: When you say -- sell out?"

"Answer: No. Sell out accounts."

Continuing on 52:

"In other words, his charts would give him a buy or sell signal, as he would say. If it gave him sell General Motors, all his accounts would sell General Motors, so that you could pretty much tell by looking at his runs whether his charts were telling him to buy or sell."

MR. SHAFFER: I object to this answer, your Honor.

MR. BARIST: "You didn't have to ask him" --

THE COURT: Just a moment.

MR. SHAFFER: He is now telling about what deGive's system is and what it tells him. He does not know, he is not a chartist.

MR. BARIST: It goes to his state of mind, if nothing else -- Mr. Mitchell's state of mind.

MR. SHAFFER: I suppose so. I withdraw it.

THE COURT: All right.

MR. BARIST: "In other words, his charts would give him a buy or sell signal, as he would say. If it gave him sell General Motors, all his accounts would sell General Motors, so that you could pretty much tell by looking at his runs whether his charts were telling him to buy or sell. You didn't have to ask him, you could tell his charts were telling him a sell signal or buy signal by the transactions in the account, contrary to the general salesmen, who didn't follow the technical approach to the market, who would be buying based on a research recommendation or selling based on a research recommendation.

"Question: Let me understand this clearly now. If you looked at Mr. deGive's runs during 1969, his IBM runs, you would find upon a particular day that all of his activity was buying or all of his activity was selling;

is that correct?

"Answer: Not every day.

"Question: No, but on a particular day.

"Answer: If his charts gave him a buy signal" --

MR. SHAFFER: That I object to.

THE COURT: Sustained.

MR. BARIST: Page 52, line 22.

"Question: No, no. All I asked you is what you say."

THE COURT: "Saw."

MR. BARIST: "Saw," excuse me.

"When you looked at his IBM runs you would see that his activity for the day was either to buy or to sell; is that correct?

"Answer: Right.

"Question: But it wasn't both buy and sell?

"Answer: There could have been some cases.

But, generally speaking --

"Question: That would be rare?

"Answer: Very rare."

Going to page 54:

"Question: So that then this pattern that you were asked about and which you recalled, which appeared in terms of the transactions handled" --

ORDER AND OPINION, DATED DECEMBER 22, 1976
(Pages A-772 to A-809 following)

A-772

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
CANDACE VAN ALLEN, :
 :
 Plaintiff, :
 :
 - v - : 71 Civ. 5438
 :
 DOMINICK & DOMINICK, INC. :
 and PAUL deGIVE, :
 :
 Defendants. :
-----x

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LAWRENCE W. PIERCE, D.J.

OPINION AND ORDER

This is an action brought by plaintiff Candace Van Alen against her broker of seventeen years, Paul deGive, and deGive's employer, Dominick & Dominick, Incorporated ("Dominick").

The third amended complaint charges defendants with violations of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, violations of the rules of the New York Stock Exchange ("NYSE") and common-law fraud in the handling of plaintiff discretionary account at Dominick during the period February 1969 through April 1970, as well as in the handling of plaintiff's discretionary custodial account controlled by deGive at The Bank of New York and later at the First National City Bank. Count One alleges churning of the accounts, for which alleged violation plaintiff seeks damages in the amount of \$559,046.00, the net trading losses claimed. Count Two charges common law fraud, alleging inter alia, that the defendants falsely represented to the plaintiff that they would comply with the securities laws and the NYSE rules, and that they had developed and "perfected a system insuring profits in the purchase and sale of securities," which system would result in profits to the plaintiff. Count Three alleges excessive trading and unsuitability of securities in the Dominick account, and Count Four makes similar charges with respect to the plaintiff's custody account at The Bank of New York. Count Five was dismissed by order of this Court dated July 16, 1975. Having heard all the evidence and having considered the matter, the Court now concludes that the plaintiff's case is without merit, and dismisses the complaint in its entirety. The following shall constitute the Court's

findings of fact and conclusions of law pursuant to Rule 52(a) Fed.R.Civ.P.

Findings of Fact

Candace Van Alen, prior to and during the time in question, was a woman of substantial financial position, married to a millionaire and a millionaire in her own right. Plaintiff graduated from Vassar College in 1933, having taken at least two courses in elementary economics. She testified that during her college days, she was aware of the turmoil in the securities industry, but that she did not follow the market. She was aware that many persons had experienced great losses in the securities market. Following her graduation from Vassar, plaintiff did graduate work in literary studies at Radcliffe and undertook further schooling at the Sorbonne. While Mrs. Van Alen cannot be described as a career woman, she did at one time hold the position of assistant editor at Vogue magazine, and she was a contributing editor to the New York Herald Tribune.

In 1948, plaintiff married James Van Alen, a wealthy individual who had been active in the stock market since 1940. James Van Alen was, and is the beneficiary of certain substantial family trust funds; however, the plaintiff knew that he had a lifetime beneficial interest and that no interest in these family trusts would pass to her. Accordingly, in 1948 James Van Alen gave the plaintiff, his second wife, the sum of \$200,000

to be invested in the securities market; the funds were placed in a custody account at the Empire Trust Co. In the same year, James Van Alen introduced the plaintiff to defendant Paul deGive, a market analyst who was soon to join the firm of Dominick & Dominick.

In 1953, Mrs. Van Alen and her husband met with deGive to discuss the investment of plaintiff's funds. At that time the worth of the plaintiff's holdings had decreased to approximately \$125,000.00. As far as Mrs. Van Alen was concerned deGive in 1953 was one of the "guiding lights" of the Dominick firm; her husband had informed her that deGive was a very good broker. In the autumn of that year, the Van Alens and deGive met at the Van Alens' home in Millbrook, New York. The three decided that deGive should be given discretionary control over plaintiff's securities and that he should undertake to "nurture the account and make it grow". On this initial question of plaintiff's investment intent, the testimony of the adverse parties generally is consistent as to what was said in 1953. The parties discussed the fact that the fund was the extent of plaintiff's holdings, and that the plaintiff did not stand to benefit from her husband's trust interests after his death. It is clear that plaintiff asked deGive to treat the account as if it belonged to a member of his own family. Mrs. Van Alen testified that she also told deGive that she needed the money "for her old age"; however, deGive denied that such a statement was made. In any event, it is

clear that Mrs. Van Alen was interested in growth as well as security. She asked deGive not only to "look after" the account, but indicated that she hoped he would "build it up."

Plaintiff testified that she wished deGive to take full control over the account since she didn't know "anything" about the stock market and since she and her husband traveled extensively, spending many months each year away from their residence in upstate New York, Long Island, and Newport, Rhode Island. On April 29, 1953, deGive was given trading authority over the Empire Trust custody account, and in July, 1953 an account was opened for the plaintiff at the Dominick firm, which at all relevant times was a brokerage and investment banking house and a member of the New York Stock Exchange. The two separate accounts were established at plaintiff's express direction.

Plaintiff testified that during their initial discussion in 1953, deGive stated that the accounts would be handled in accordance with the regulations of the securities laws and pursuant to the rules of the Exchange. While plaintiff did not have a specific understanding of the provisions of the applicable rules, she testified that it was her understanding that the rules were designed for the protection of investors. DeGive testified that although he had no recollection of any discussion concerning rules and regulations, the

fact that the account would be run in accordance with the applicable regulations was a fact that he believed was understood by the plaintiff.

Defendant deGive testified that he was aware of the financial position of the Van Alens, and that he was aware of the growth of their wealth during the years between 1953 and 1969. deGive knew that the net worth of James Van Alen, approached one million dollars, and that he had substantial income from securities owned outright. deGive was aware of the Vanderbilt family trusts which inured to the benefit of James Van Alen, and he knew of the fact that the Van Alens maintained a shooting preserve at Millbrook, New York, an apartment at Fifth Avenue and 72nd Street in Manhattan, ten acres of land opposite the C.W. Post College on Long Island, and a principal residence on an estate overlooking the Atlantic Ocean in Newport, Rhode Island. deGive testified that he took these factors into account in his handling of plaintiff's securities accounts.

The key to the method by which deGive managed the Van Alen account, and the key to the plaintiff's claims herein, is deGive's "Technical System" which he had developed in an attempt to predict movement in the stock market on the basis, inter alia, of the amount of capital flowing in or out of the market. deGive, a chartist, employed an elaborate system of graphs to assist in the management of a number of discretionary accounts, as well as for the basis of a weekly market letter

entitled "Technical Comments" (see Def. Ex. 116).

The exact operation of the technical system was described in great detail by deGive during his examination on plaintiff's direct case. The essence of the concept involved the calculation of a series of seven, ten, twelve, eighteen, and thirty/^{-day} "moving averages" employed to determine buying and selling pressures in the market as a whole. A sixty-day moving average was computed from information provided to deGive by another chartist, Lowry's Services, Inc. The information which made up these moving averages was drawn from the price action and volume of certain individual stocks, the Dow Jones Industrial, Utility and Railroad averages, and all NYSE listed stocks taken as a whole. To calculate each moving average, deGive would take the total number of issues which advanced (for a "buying" indicator) or declined (for a "selling" indicator) each day and divide that figure by the total number of issues traded. The resulting percentage ratio would be added to similar ratios for each of the days in the particular cycle, whether it was seven, ten, or thirty, and then that figure would be divided by the total number of days in the moving average. The result for each of the many moving averages was calculated each day, and the information plotted on a series of flat charts as well as on a huge scroll-type chart; this larger chart also contained certain information on market movements calculated on an hourly basis (see Plf. Ex. 35).

The resultant series of lines would move up or down in cycles as market conditions changed. deGive called these lines "impulses", "thrusts" or "oscillators".

As the various moving averages produced cycles equal in length to the number of days for which they were calculated, deGive would compare the highs and the lows of the cycles to highs and lows in previous months or years. If there was concurrence among a certain number of indicators that the market was moving up or down as a whole, deGive testified that he would derive a "buy" or a "sell" signal. On the basis of these signals, deGive would write his market letter and would buy or sell securities for his discretionary accounts, including those of the plaintiff.

Since the technical system was an attempt to predict the movement of the market as a whole, deGive invested in stocks which together would reflect a cross-section of the market. deGive would purchase securities in each of three categories: those which had in the past performed behind the market, those which had performed with the market, and those which had moved ahead of the market.

The evidence for the years prior to and including 1970 strongly supports the conclusion, and the Court specifically finds, that the nature of deGive's system was such that in order to function as a basis for investment decisions, the system, as deGive understood it, indicated "major moves" in buying or selling when a certain number of indicators produced

an appropriate signal. deGive testified that the 1969-70 transactions at issue in this lawsuit were "major moves" in the plaintiff's accounts, and Dominick's compliance officer Thomas Mitchell testified that deGive always made purchases or sales in all his accounts at the same time. Indeed, in 1966 and 1967, deGive made massive profits for plaintiff through such "major moves." (See Plf. Ex. 66, Def. Ex. 98(f)).

deGive employed the system as a basis for all his investment decisions and recommendations. The evidence in the case supports the conclusion that the "moves" made by deGive in the plaintiff's accounts corresponded with the recommendations made in his market letter, which was circulated to several hundred subscribers, and with the "moves" deGive made in trading for his wife's account.

While neither party presented any expert testimony with respect to the wisdom or the efficacy of the system described at trial, it is clear that for many years the system was highly successful. There is no dispute that from the beginning of his handling of the Van Alen account until the end of 1968, deGive acted in accordance with the signals given him by his system, and there can be no dispute that during this fifteen year period deGive produced substantial growth in plaintiff's account and significant profits in many years. Further, having reviewed the exhibits and heard the testimony

of the defendant deGive and assessed his demeanor, the Court finds that deGive had a strong good faith belief in the efficacy of his technical material. This finding is supported by the fact that the same recommendations were made to several hundred persons, and by the fact that deGive made parallel moves in his wife's account when he moved in plaintiff's account.

Further, it cannot be disputed that the securities purchased for the plaintiff were of reputable quality (see Def. Ex. 244). Every stock was listed on the New York Stock Exchange (Id.). Both plaintiff and deGive testified that once when Mrs. Van Alen asked about a certain "hot" stock, deGive refused to purchase it since it was not a listed security and since he was not familiar with the company.

From 1953 through 1966, plaintiff maintained the above-mentioned two accounts at Dominick and at the Empire Trust Co. In 1966, the Empire Trust merged into The Bank of New York, which held plaintiff's custodial account until October, 1969, when she transferred this custodial account to First National City Bank ("FNCB") upon The Bank of New York's refusal to loan money to plaintiff which she sought in order to purchase securities.

While the evidence on the issue of plaintiff's direct participation in the management of her securities accounts is mixed, the Court must conclude that the plaintiff has failed to substantiate her claim that she was ignorant

of developments in her account. This finding of fact is based upon the Court's assessment of the plaintiff's own testimony at trial, and upon a comparison of that testimony with the other evidence in the case.

First, there is no dispute that from 1953 until 1970, monthly statements and confirmation slips of all trades executed in each of plaintiff's accounts were transmitted to plaintiff's home in Newport, Rhode Island, where they were reviewed by the plaintiff or by her personal secretary, Mary Grace Watson. The statements and slips were also transmitted to various attorneys who acted as tax consultants for the plaintiff. These transmittals were made pursuant to specific instructions placed upon plaintiff's account card at Dominick (Plf. Ex. 28).

Second, there is no dispute that during the period between 1962 and 1969, plaintiff obtained a series of loans, totalling hundreds of thousands of dollars in order to invest further in the market pursuant to deGive's system. While plaintiff testified that a \$200,000 loan obtained from the First National City Bank in October 1969 was sought pursuant to deGive's urgings, Mrs. Van Alen offered no similar explanation concerning the several other loans of \$100,000 or more obtained during the period 1962-1968. In this connection, the Court further notes that in 1963, the plaintiff converted her account at Dominick into a margin account, making possible even greater purchases of securities by deGive pursuant to

plaintiff's grant of discretionary authority to him. During this same period, there was considerable correspondence between The Bank of New York, deGive, and Ms. Watson, plaintiff's secretary. In some instances over the years there was written correspondence between the plaintiff and deGive which indicated an interest by the plaintiff in her various financial undertakings.

For example, on June 7, 1962, the plaintiff wrote to deGive concerning the market's "perigrinations" (Def. Ex. 40). On October 10, 1968, plaintiff's secretary, Ms. Watson, wrote to The Bank of New York "at the request of Mrs. Candace Van Alen" to inquire about the current interest rate on one of the loans (Def. Ex. 60). On October 14, 1968, Mrs. Van Alen herself wrote to an officer at The Bank of New York concerning the tardy transmission of a letter of transmittal in connection with a tender offer which had attracted plaintiff's attention. (Def. Ex. 46). In November, 1968, Ms. Watson wrote to deGive concerning interest charged on a loan which was to be repaid through the sale of securities--this letter specifically referred to "checking up" on the October confirmation slips. (Def. Ex. 100). While Mrs. Van Alen stated on cross-examination that she had no recollection of these letters and others, the Court is compelled to conclude that the plaintiff, either directly or through her employee Ms. Watson, was keeping watch over her accounts and over the related loans.

Finally, although the record is far from clear on the extent to which the plaintiff was in direct communication with deGive prior to and during the complaint period, it is apparent that there were discussions concerning market conditions, the advisability of loans to purchase more securities, the merits of some particular stock issues, and the indicators being generated by deGive's system.

It is further clear that the majority of these conversations concerning the plaintiff's account took place between James Van Alen, the plaintiff, and deGive. Although the plaintiff testified that she did little more than listen during these conversations, her seeming familiarity with certain of the technical terms used by deGive, combined with the undisputed fact that James Van Alen listed his own occupation as "investor" (see Def. Ex. 65, 66, 67), lead to the reasonable inference, from all the evidence, that during the period preceding and during the complaint transactions there were significant contacts between the parties with respect to the market and with respect to plaintiff's securities accounts. Further, in light of all the evidence, including the plaintiff's frequent use at trial of the term "we" in referring to actions or decisions made by her with respect to her accounts, the Court declines to accept plaintiff's testimony to the effect that she did not consult with her husband about what was transpiring in her accounts. Rather, the Court finds that

James Van Alen was frequently consulted. Indeed, plaintiff had good reason to be interested in the progress of her accounts, as the following summary indicates:

<u>Year</u>	<u>Dominick Profit (Loss)</u>	<u>Empire/BNY Profit (Loss)</u>
1964	(\$1,799)	\$4,078
1965	\$6,110	\$7,076
1966	\$63,875	\$203,244
1967	\$203,126	\$352,994
1968	(\$89,950)	(\$95,072)

(Source: Def. Ex. 98(c) and 98(d))

There is no claim that during these years deGive failed to follow this system. Further, it is uncontroverted that the plaintiff never complained about the handling of the account until the beginning of 1970. As plaintiff testified on cross-examination, "I never objected to anything that he did, good or bad."

The evidence establishes that during these years, and during the period of the complaint, deGive handled plaintiff's account without any significant intervention or supervision by other members of the Dominick firm. It appears that the only surveillance of deGive's activities was made by Thomas Mitchell, Dominick's compliance officer, who with his staff reviewed each day all confirmation slips of all trades of the preceding day effected by Dominick representatives. This review also included a daily IBM printout which listed all trades made, broker by

broker. Mitchell testified that this IBM run would identify A-786 the accounts involved by symbol, but that there was no way for his office to identify trades made by deGive for Mrs. Van Alen at the bank custody accounts or to separate those trades out from other trades made by the same bank for other persons through the Dominick firm. Further, it is clear from the evidence that the trades made by deGive were not initialed or approved in advance by any other member or allied member in the Dominick firm. Nor is it at all clear whether or not discretionary trades were identified as such at key control points in the Dominick operation. It is quite apparent that the officers of Dominick made no attempt to supervise the transactions occurring in the plaintiff's custodial accounts at the different banks. However, officers of Dominick who testified stated, and the Court finds the testimony credible, that they believed that during the time in question the firm was operating within the guidelines set forth in the NYSE rules, specifically Rules 405, 408 and 342. This testimony, given by Avery Rockefeller, president of Dominick at the time in question, Thomas Mitchell, compliance officer, Robert Neumayer, vice president in charge of operations, and by Paul deGive himself, is relevant to the claimed misrepresentations alleged in Count Two, and specifically to the scienter element.

Despite these apparent deficiencies in the Dominick control procedures, the evidence including the unanimous testimony

of the officers is that, over a period of years, they had faith in the operation of deGive's system and in deGive's professional reputation in the financial community. As stated by Mitchell, even had he detected major purchases and sales, or other purchases and sales by deGive in the Van Alen accounts, he would not have inquired of the broker since he believed that deGive knew his system better than he did, and since Mitchell believed that deGive always had valid reasons for his investment decisions. For reasons stated hereinbelow, the Court does not find persuasive the testimony of plaintiff's expert to the effect that a responsible compliance officer, under all of the circumstances presented, would have refused to allow deGive to continue trading in plaintiff's account after the May 1969 transactions.

With this background established concerning the nature of plaintiff's investment objectives, the technical system employed by deGive, the history of plaintiff's accounts in the years 1953 through 1968, and the procedures at the Dominick firm, the Court now turns to the transactions at issue in February 1969 through March 1970.

In early 1969, the total value of plaintiff's securities was approximately 1.6 million dollars, a substantial increase from the total value of \$125,000 in 1953, even when the addition of the loan proceeds are considered. In late 1968 deGive had made significant sales in the accounts and by February 1969 his indicators yielded a "buy" signal.

Between February 11 and 14, 1969, deGive purchased several hundred thousand dollars of securities, (Plf. Ex. 2) in what he described as a "major move" based upon favorable indications from his sixty-day and shorter moving averages. In his February 11, 1969 Technical Comment, deGive wrote that

"buying is beginning to increase and such a development after a period of sidewise market action normally signals a worthwhile advance" (Def. Ex. 166 No. 295)

At the same time, another prominent chartist upon whose information deGive relied in part, Lowry's Services, Inc., published a "buy" signal. (See Plf. Ex. 37) Further, on February 11 and 12, 1969, deGive made major purchases of similar securities for the account of his wife (see Plf. Ex. 63). On February 14, 1969, the Dow Jones Industrial Average stood at 951.95, having risen over thirty points in one month (see Def. Ex. 90).

In less than a week, both deGive's indicators and the Lowry indicators reversed course, revealing a "sell" signal. deGive testified at trial that he had made a "mistake" in early February, that he had failed to read one indicator or that he had misread an indicator. On February 17, 1969, deGive wrote as follows in his market letter:

"Last week the market entered a testing period whereby buying commenced to increase. However, to date there has not been sufficient follow through to signal a broad advance. Accordingly, a return to the sidelines is suggested until the market once more records a fully oversold condition." (Def. Ex. 166 No. 296)

On February 18 and 20, 1969, deGive sold out of plaintiff's account nearly every security purchased a week before. On the 17th and 18th he also made similar massive sales in his wife's account. The Dow Jones was quickly slipping downward, falling below 900 by February 25, 1969.

Plaintiff testified that she and her husband met with deGive for breakfast at the Westbury Hotel in New York on February 20, 1969 and again on March 6, 1969. With regard to the first meeting, Mrs. Van Alen stated that the recent activity in her accounts was not discussed, and that she did not know of the sales since she had not been at Newport where the confirmation slips were sent. deGive testified that these meetings were during or after the time he had made the sales, and that he told Mrs. Van Alen he had made a "mistake" and that he wanted to sell to cut losses early. While deGive testified that the plaintiff approved, it is clear he was not asking permission and that he had already taken the action. The plaintiff stated that she recalled no such conversation, that there was no discussion about getting out of the market, and that no specific securities were discussed.

While the Court does not adopt totally deGive's version of the meetings, it does find his testimony more credible than that opposed to it. Thus, the Court finds that the parties met and discussed the accounts, and that the plaintiff made no complaint about deGive's activities.

After the sales in late February, 1969 deGive invested plaintiff's funds in United States Treasury bills, a transaction for which he received no commission and for which Dominick received but a flat fee of \$10 for each bill purchased. Thus, plaintiff's accounts for the most part stayed out of the market until deGive's next move, in late April, 1969.

Throughout March and April 1969, the Dow Jones Industrial Average remained at the position reached shortly after the February sales, ranging between 899 and 930 or slightly higher. However, during the month of April the Dow began to move above 930, and during May the indicator climbed as high as 968. (Def. Ex. 90). On April 30, 1969, deGive wrote that "various intermediate and long term indicators are now reversing a downtrend which has been in effect since last fall." (Def. Ex. 116 No. 305) The market letter also listed a series of recommended stocks, several of which deGive bought for the plaintiff the same day. At trial, deGive testified that this was another "major move", involving at least 50% of plaintiff's holdings. deGive testified that he made these buys on the basis of his long-term indicators. deGive also made significant purchases for his wife's accounts in the same time period. On May 5, 1969, deGive's market letter again recommended certain purchases (Def. Ex. 116 No. 306) and deGive made a few more purchases for plaintiff's account.

By late May the Dow had again reversed course, slipping into the 930's and on May 26, 1969, deGive derived a "sell" signal from his long-term technical material. Further,

the buy signals had, in his word, "aborted." deGive wrote as follows:

"The advance which began around the middle of April has failed to produce the normal buying surges and market breadth is negative. The various technical indicators are signalling caution. Investors should now adopt a policy of eliminating weak holdings." (Def. Ex. 116, No. 309)

On May 27, 1969, deGive sold nearly every stock held in plaintiff's accounts. Although his market letter recommended only the elimination of "weak holdings", the "major" sale proved the prudent course. In less than two weeks the Dow Industrials slumped below 900, and less than six weeks thereafter, the Dow slid downhill to close at 801 on July 29, 1969. The market never rose above the 830's until the following October. The "sell" signal derived by deGive in late May 1969 preceded a similar sell signal from Lowry's Services published on June 12, 1969. Further, deGive also made in late May substantial sales in his wife's account. Plaintiff testified that perhaps she did speak to deGive in June or July of 1969, by telephone from her Newport home. There is no evidence that Mrs. Van Alen made any complaint about the April/May transactions. Through the summer and into the early fall, as the stock market continued its hundred-point decline, plaintiff's accounts were again safely invested in Treasury bills, pursuant to deGive's directions. deGive did not return to the market until October, 1969.

It is defendants' contention that the parties met in New York on October 7, 1969 to discuss reentering the market; however, the evidence is insufficient to establish whether such a meeting took place. Nevertheless, Mrs. Van Alen testified that prior to October 16, 1969, deGive had told her that his indicators recommended a return to the market. There is again no evidence that Mrs. Van Alen made any complaint during this period concerning the transactions in the accounts. In the fall of 1969, deGive was recommending purchases for intermediate and long-term holders of securities. In his October 13, 1969 market letter, he wrote as follows:...

"Last-week the market retested the 800 level in the Dow Jones Industrial averages with a noticeable drop in liquidation and an improvement in accumulation of stocks as compared with the other testing periods in July, August and September.

"Accordingly, it is my opinion the stocks can be purchased for an intermediate advance and especially the depressed stocks which have had important declines and which during the past three months have established well defined bases." (Def. Ex. 166 No. 327)

Similarly, Lowry's Services published a "buy" signal on October 13, 1969. On that day and on days following, deGive made major purchasing moves in the plaintiff's accounts. deGive also ordered major buys in his wife's accounts. deGive testified that in his view he was buying in an intermediate oversold market condition, that the long-term indicators were favorable, and that he considered the move a long-term investment.

Shortly after this return to the marketplace, plaintiff and her husband met with deGive on October 16, 1969. At the Dominick offices, deGive displayed his system to the plaintiff. According to the plaintiff he stated that he now had the system "almost all set up". The Court finds that deGive did not state that the system had been perfected. There is no evidence that the plaintiff complained about the past losses in the account or that she questioned the wisdom of following the system in the future. Indeed, deGive had already returned to the market and the parties went on to consider a \$200,000 loan for the purpose of purchasing more stocks. From the evidence as a whole, the Court concludes that this \$200,000 loan was made on deGive's recommendation. However, it is clear that the plaintiff concurred in the undertaking and that she took various steps to obtain the loan. Indeed, when The Bank of New York refused to give such a loan to plaintiff, she countered by closing out her entire account with that bank. deGive thereafter put the plaintiff in contact with officers of the First National City Bank (FNCB), and on October 23, 1969, that bank loaned plaintiff the amount she sought for the purpose of purchasing securities. The following day plaintiff's custodian account at The Bank of New York was transferred to FNCB. The proceeds of the loan were available to the plaintiff by October 27, 1969, and the Dow that day closed at 860.28 (Def. Ex. 90). On the same day, deGive wrote as follows in his market letter:

"Last week the market continued to advance with broad participation and satisfactory upside volume.

A-794

"The present up trend is now in the third week and is expected to last for the full six week cycle." (Def. Ex. 116 No. 329)

On October 28 and 29, 1969, deGive purchased large amounts of securities for the plaintiff, consuming almost the entire proceeds of the loan. During the month of October, deGive also made significant purchases in his wife's account.

deGive's October, 1969 market analyses were confirmed by the progress of the Dow averages. In the week preceding the October 14 purchases, the market rose from the 800 level and climbed to 830. The indicator continued to advance into late October, closing at 855 on October 28, 1969. By November 10, 1969, the Dow stood at 863.05. However, the indicator was not to climb any higher, and in fact was to plummet below 800 in less than one month (see Def. Ex. 90).

On November 10, 1969, deGive wrote that the "market is now nearing the end of a six week upcycle and will become increasingly selective. Accordingly, new buying should be deferred for the present." (Def. Ex. 116 No. 331). On the following day deGive sold a portion of plaintiff's securities for around \$90,000, earning a short-term profit for Mrs. Van Alen on each of the five issues traded. (See Plf. Ex. 2). deGive similarly made sales in his wife's account. In a letter to Mrs. Van Alen dated November 20, 1969, deGive wrote that he had

made the sales to offset short-term losses already experienced in 1969 (see Def. Ex. 45).

By the end of December, the Dow Industrials, having reached a low of 773.83 on December 16, 1969, closed at the 800 level. On December 29, 1969, deGive wrote as follows:

"The current decline has completed a six week down cycle with the long term material showing a worthwhile improvement over the July bottom when the averages were at a higher level. Now is the time to assume a more aggressive buying attitude in the general market." (Def. Ex. 116 No. 338)

On that date and on January 2, 1970, deGive purchased for the plaintiff five issues in the total amount of approximately \$100,000. On January 5, 1969, the market rose to 811.3, but shortly thereafter commenced another decline.

In early January, 1970, deGive spoke to the plaintiff by telephone and informed her that his technical materials were again deteriorating, and that he was recommending sales. deGive stated that he did not want to sell out the plaintiff's stocks without consulting with her and without her approval. According to deGive, Mrs. Van Alen, having listened on an extension with her husband, said, "Paul, I'll think about it and call you back." Shortly thereafter the Van Alens, vacationing in South Carolina, discussed the market at a social gathering with two prominent investment bankers, Dean Witter and Lloyd Griscom. On January 28, 1970, plaintiff and her husband telephoned deGive and ordered him to sell all of plaintiff's securities.

deGive did so. The Court finds that plaintiff has not proven by a fair preponderance of the credible evidence her contention that she told deGive to "get out and stay out."

In early March, 1970, deGive spoke to plaintiff prior to making new purchases. deGive told plaintiff that certain stocks were quite depressed and that he did not believe there would be much risk of loss. After plaintiff indicated caution, deGive suggested investing 50% of her funds. deGive understood plaintiff to have approved such a move. deGive's March 2, 1970 market letter stated as follows:

"For the past four weeks the internal structure of the market has shown improvement, that is, an increasing number of stocks have been forming bases and emerging on the upside." (Def. Ex. 116 No. 347)

On March 3, and 4, 1970, deGive made another major purchasing move in plaintiff's account. The Dow average, having sunk as low as 744.06 on January 30, 1970, had risen to 787.42, and was to remain above 760 through the rest of the month (Def. Ex. 91). In late February and early March, 1970, deGive also made major purchases in his wife's account.

Shortly after the purchases, Mrs. Van Alen returned to her Newport home to find a new stack of purchase confirmations. She called deGive, asked him why he went back into the market, and requested a list of the stocks bought. Plaintiff testified that no such list was ever received. Shortly thereafter plaintiff met with her husband and deGive at their New York apartment.

On April 3, 1970, plaintiff wrote to the Dominick firm, directing that all her securities be transferred to The Bank of New York and revoking the trading authorization she had given deGive in 1953. The value of plaintiff's securities at the end of March, 1970 totalled \$1,004,790.81. (Pf. Ex. 20). During the period of the complaint, the Dow Jones Industrial average had declined nearly 150 points. (Def. Ex. 90, 91).

During the period of the complaint, Mrs. Van Alen paid slightly more than \$73,000 in commissions on the various transactions in her accounts (Def. Ex. 242). deGive testified that one-third of all commissions were paid to him.

In 1968, deGive made approximately \$14,000 in commissions from activity in plaintiff's accounts. In 1969, deGive earned \$18,000 from such activity. In the period January through March, 1970, deGive earned approximately \$6,000 in commissions, of which more than \$4,000 resulted from the January sales ordered by the plaintiff (see Def. Ex. 242, 243). deGive testified that in 1969, his own financial condition had improved markedly. His wife had received a substantial inheritance in the years 1965-1969, and in 1969, his educational expense dropped \$10,000 due to the graduation from college and graduate school of three of his children. deGive's total annual income, from commissions and from the market letter, was approximately \$100,000 during each of the years 1968 and 1969.

deGive testified that he regarded the plaintiff as an "investor" as distinguished from a "trader" or a "long-term

investor". Accordingly, deGive saw Mrs. Van Alen as a stockholder who held securities as long as conditions were favorable, based upon the movements of his system's sixty-day cycles. deGive did not regard the plaintiff as a person whose securities should be traded on the basis of short-term indicators, nor did he see her accounts as ones which should hold onto securities for a long period of time regardless of market conditions. However, deGive indicated that, depending on the cycles, he sometimes regarded plaintiff as an "intermediate trader" who would move on the thirty-day cycle.

Mrs. Van Alen testified that she knew that the market can go up and down. She stated that deGive never guaranteed that she'd earn profits. She never instructed deGive not to engage in short-term trading. She stated that she was aware of the risks involved in taking out loans to purchase securities. She never complained about the short-term trading in 1968 which resulted in substantial profits; indeed, she testified that deGive handled the accounts very well in 1968. At trial, plaintiff admitted that she never informed deGive whether she was interested in trading or in investment. Indeed, in her deposition, Mrs. Van Alen testified that she had no objection to short-term trading if it turned out well. Plaintiff urges that the turnover rate in her account was three for the period in question. Defendants argue that the annualized rate is only 2.17.

Upon this set of facts plaintiff seeks to hold defendants liable for alleged violations of the federal securities laws.

The federal securities laws are not a panacea for all losses suffered in the stock market upon the recommendation of brokers. A recommendation that goes awry does not make out a claim under Rule 10b-5. See Mallinckrodt Chemical Works v. Goldman, Sachs & Co., [Current] CCH Fed.Sec.L.Rep. ¶95,721 (S.D.N.Y. September 14, 1976) (Tenney, J.). While it is well established that a defrauded customer may sue her broker for "churning" her account and that such activity constitutes a scheme or device to defraud under Rule 10b-5, see e.g., Carras v. Burns, 516 F.2d 251, 258 (4th Cir. 1975), in order to prevail upon such a claim, plaintiff must show that the defendants excessively traded her account in disregard of her investment objectives and in order to obtain commissions for themselves. See Greenfield v. D.H.Blair & Co. [1975-76] CCH Fed.Sec.L.Rep. ¶95,239 (S.D.N.Y. 1975). Further, plaintiff must show that the defendants acted with scienter, that is, that they traded her account with an intent to defraud, see Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976), or at least with a wilful and reckless disregard of whether or not their actions operated as a fraud upon plaintiff. See Lanza v. Drezel & Co., 479 F.2d 1277, 1306 (2d Cir. 1973) (en banc).

"Churning essentially involves improper purpose on the part of a broker to derive profits for himself with little regard for the interests of his customer." (Stevens v. Abbott, Proctor & Paine, 288 F.Supp. 836, 845 (E.D. Va. 1968)).

While churning, if present, constitutes an insidious business practice well deserving of sanction under the securities laws, plaintiff cannot prevail solely upon a showing of excessive trading. See Gleit v. Shearson, Hammill & Co., 74 Civ. 4082 (S.D.N.Y. October 20, 1976); Greenfeld v. D.H. Blair, *supra*; Newburger, Loeb & Co. v. Gross, 365 F.Supp. 1364, 1371 (S.D.N.Y. 1973). Plaintiff must prove that the amount of trading was unjustified under the facts and circumstances of the case and in light of her investment objectives. See Hecht v. Harris, Upham & Co., 283 F.Supp. 417, 435 (N.D. Cal. 1968), modified on other grounds, 430 F.2d 1202 (9th Cir. 1970).

Initially, the turnover rate in plaintiff's accounts is not excessive under the cases, even assuming that the rate is 3, as urged by the plaintiff. See Gleit v. Shearson, Hammill & Co., *supra*; Moscarelli v. Stamm, 288 F.Supp. 453 (E.D.N.Y. 1968) (annual rate of 144); Hecht v. Harris, Upham & Co., *supra*; Pierce v. Richard Ellis & Co., 62 Misc.2d 771, 310 N.Y.S. 2d 266 (Civ. Ct. N.Y. Cnty. 1970); see also Note, Churning By Securities Dealers, 80 Harv.L.Rev. 869 (1967):

"[I]t is possible to generalize from the SEC cases that a complete turnover more than once every two months [i.e., an annual rate of 6] is likely to be labeled excessive, and this conclusion appears reasonable." (Id. at 876).

While a claim of churning cannot be decided upon the turnover rate alone, plaintiff has cited no decision which has found excessive an annual rate as low as that presented here.

Second, the Court finds that the transactions executed by deGive were not excessive in light of the plaintiff's intent to "build up" her account. Nor can defendants be held liable for doing in 1969-70 that which they did from 1966 through 1968 with plaintiff's blessings. Plaintiff was in frequent contact with deGive; she was aware of his system and the fact that deGive made "major moves" and on occasion executed short-term transactions. For seventeen years confirmation slips were sent to her home and to her lawyers. It is clear from all the evidence that plaintiff was willing to accept the benefits of intermediate trading, and of deGive's system generally. She must also accept its deficiencies. Indeed, in this Court's view, this case is an appropriate one for the application of the principle of estoppel.

In Landry v. Hemphill, Noyes & Co., 473 F.2d 365 (1st Cir. 1973), the Court of Appeals affirmed the lower court's grant to defendants of judgment notwithstanding the verdict, employing terms applicable to this case:

"We base this conclusion on plaintiff's uncomplaining acceptance of what was done for him by defendants over a twenty-two month period. It was uncontroverted that Landry regularly received confirmation slips and monthly statements from Hemphill Noyes setting forth the full details of every transaction entered, and that with one minor exception . . . he at no time registered any complaints with defendants concerning the manner in which his account was being handled. Given plaintiff's obvious experience in the stock market, we hold as a matter of law that he must have realized the inconsistency between his alleged investment intent and what was

actually occurring in his account; he is therefore estopped from arguing, for the purposes of his churning claim, that he was an investor rather than a trader." (Id. at 373-74).

Similarly, on the basis of plaintiff's acceptance for seventeen years of deGive's methods, and on the basis of the Court's assessment of her knowledge and the knowledge of her husband concerning the stock market, the Court holds that plaintiff, as a matter of law, is estopped from claiming that she was a long-term investor rather than an investor who holds only so long as conditions remain favorable.

Third, plaintiff cannot sustain her claim that deGive's actions in 1969-1970 constituted a scheme, device or artifice to defraud. As the Court has noted above, each of deGive's moves in the plaintiff's accounts was made in accordance with his market letter, and thus was based upon the indicators of his system. Despite a valiant attempt by plaintiff's competent trial counsel, the evidence in the case just does not substantiate the claim that deGive's indicators constituted a "paper system" which defendants employed as an "umbrella" against the charge of churning. Nor has plaintiff proved by a preponderance of the evidence her claim that in 1969-70 deGive deviated from past practices and commenced to make investment decisions without consulting his long-term indicators. Rather, the evidence is that each investment decision was made after consideration of the system's indicators and indeed, that many of the decisions made by deGive did accurately anticipate

the movement of the market as a whole. This is not the usual churning case where the broker can offer no explanation or justification for his trading. See Stevens v. Abbott, Proctor & Paine, 288 F.Supp. 836, 840 (E.D. Va. 1968); E.H. Rollins & Sons, 18 S.E.C. 347 (1945). Rather, here the record contains a complete rationale for each investment move made by deGive. It is not the function of this Court to judge the ultimate wisdom of those moves; nor is it the purpose of the securities laws to guard against improvident or even negligent actions of persons such as the defendants. See Ernst & Ernst, supra. A review of the paucity of evidence herein as to scienter confirms the Court's conclusion that no scheme or device is present in this case.

Since he held a discretionary power over plaintiff's accounts, deGive owed to Mrs. Van Alen the duty of a fiduciary. See Stevens v. Abbott, Proctor & Paine, supra; Pierce v. Richard Ellis & Co., supra. The plaintiff has failed to prove that deGive violated this trust. As noted above, the Court has found that deGive had a strong good faith belief in the efficiency of his technical materials. Here there was no attempt to conceal from the plaintiff the actions being taken. See Stevens v. Abbott, Proctor & Paine, supra. The great mass of the evidence militates strongly against any inference of scienter. When deGive made major sales in the accounts, he invested in U.S. Treasury bills, a transaction which gained him no commissions.

The securities purchased were always of high caliber, reflecting a cross-section of the stocks listed on the NYSE. The financial status of deGive improved in 1969. The Court cannot find that he suddenly switched to churning in order to reap a mere \$4,000 increase in commissions for that year. Further, deGive controlled a number of accounts and the percentage derived from trades in plaintiff's accounts was not more than 15 to 20% of his total commission earnings. This percentage is much lower than that in other cases where the amount warranted the inference of scienter. See, e.g., Hecht v. Harris, Upham & Co., supra, 283 F.Supp. at 436 (59% of the broker's commissions).

Finally, two factors present here negate any inference of a fraudulent intent. There is no dispute that deGive published his recommendations to several hundred persons. There is no dispute that his decisions in plaintiff's accounts reflected similar decisions made for his spouse. These are not the acts of a broker engaged in a fraudulent scheme. In prior cases brokers have been accused of fraudulently pledging to handle the account as if it belonged to a member of their own family. See e.g., Carr v. Warner, 137 F.Supp. 611, 613 (D.Mass. 1955). Here deGive did make such a promise, but it was not fraudulent and he did act in accordance with that commitment. The Court concludes that plaintiff has totally failed to establish the scienter element of her claim.

Since plaintiff has failed to prove by a preponderance of the evidence that her account was excessively traded, that the transactions were inconsonant with her investment intent, that any scheme, device or artifice to defraud was employed by the defendants, or that defendants acted with scienter, the essential elements of the churning claim have not been established, and the Rule 10b-5 claims must be dismissed.

Nor has the plaintiff established the elements of common-law fraud. Again, essential elements are lacking. These elements are: (1) material misrepresentation of an existing fact; (2) scienter; (3) reliance; and (4) causation. See Channel Master Corp. v. Aluminum Limited Sales, Inc., 4 N.Y.2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259 (1958). Further, under the applicable law, the evidence of fraud must be "clear and convincing" and any inference of fraud "unequivocal". See Manchel v. Kasdan, 286 A.D. 483, 484, 144 N.Y.S.2d 694 (1st Dept. 1955), aff'd mem., 1 N.Y.2d 734, 134 N.E.2d 687, 151 N.Y.S.2d 940 (1956).

In her amended complaint, plaintiff lists a number of alleged misrepresentations. Each of these allegations fails to satisfy at least one of the requirements of proof. With regard to the alleged misrepresentation concerning compliance with the federal securities laws, the discussion above makes clear that no such misrepresentation was made: defendants did comply with the securities laws. The second claimed

misrepresentation, that defendants told plaintiff they had "developed and perfected a system insuring profits" is not supported by the preponderance of the evidence. The Court finds that no such representation was made. As to the claim that the defendants said they would diligently supervise her accounts and that they would comply with the rules of the Exchange, the Court finds that while there may have been such a representation, the defendants did not, at the time the representation was made, have any intent to do anything other than comply with the applicable rules. Thus, as to these claimed statements, plaintiff has failed to prove the scienter element. Plaintiff has also failed to establish reliance. There is no persuasive evidence that Mrs. Van Alen relied upon the statement that Dominick would comply with the NYSE rules; indeed, she did not even know what those rules required.

Further, the Court finds there to be no credible evidence that any of the alleged misrepresentations had any causal connection to the alleged losses. The only evidence of a causal connection was presented through the testimony of an expert witness, and the Court does not find the testimony credible given the fact of this case. While the witness' credentials were adequate for certification as an expert, the Court must conclude that the hypothetical questions placed to the expert by plaintiff's counsel failed to fully reflect the circumstances of this particular case. The expert did not sit in the Courtroom throughout the presentation of the evidence;

the Court finds that his understanding of the circumstances of the case was significantly limited. Further, the witness proved so inflexible on cross-examination that his testimony turned incredible; thus, his testimony to the effect that more careful supervision would have prevented some of the later trading in the account is not given sufficient weight to establish the causation element.

Finally, for the reasons discussed in the prior section, it is clear that plaintiff has not proven common law fraud by clear and convincing evidence. It is not possible to draw an "unequivocal" inference of fraud from the facts as recited above. Accordingly, the plaintiff's claims under state law must be dismissed for failure of proof.

Plaintiff's final claims, for violation of the NYSE "due diligence" and "suitability" rules, must also be dismissed for failure of proof. While there is some authority in this District that a violation of the NYSE rules rises to the level of a cause of action under Rule 10b-5, see Starkman v. Seroussi, 377 F.Supp. 518, 524 (S.D.N.Y. 1974) (Weinfeld, J.), the Second Circuit has not resolved the issue. See Gleit v. Shearson Hammill & Co., supra.

Assuming for the sake of argument that a violation of the "suitability" and "due diligence" rules do give rise to a private action under Rule 10b-5, plaintiff has not proved that the securities purchased or the transactions made were poorly suited to her investment purposes. Nor has plaintiff

established that the technical violations of the NYSE rules were made in connection with any fraud. Since a violation of the NYSE rules may state a claim for relief in federal court only if the elements of a Rule 10b-5 fraud are established, Hecht v. Harris Upham & Co., supra, 283 F.Supp. at 430; see Isaacs v. Chartered New England Corp., 378 F.Supp. 370 (S.D.N.Y. 1974), and cases cited infra, the discussion above makes clear that the technical rules violations can produce no liability. Since plaintiff has not proven fraud, her claim based upon the NYSE rules is as deficient as if no fraud had been pleaded in the first place. See Van Alen v. Dominick & Dominick, 71 Civ. 5438 (S.D.N.Y. June 30, 1975); Rich v. New York Stock Exchange, 379 F.Supp. 1122 (S.D.N.Y. 1974). Accordingly, these claims must be dismissed. See Gleit v. Shearson, Hammill & Co., supra.

Since deGive is not liable to plaintiff on any of her claims, Dominick & Dominick cannot be liable to plaintiff for any failure to supervise deGive. While a brokerage house may be found liable for a failure to adequately supervise an employee, such liability has been found present only where the failure was in connection with fraud. See Isaacs v. Chartered New England Corp., 378 F.Supp. 370 (S.D.N.Y. 1974); SEC v. Lum's, Inc., 365 F.Supp. 1046 (S.D.N.Y. 1973). Since in this case plaintiff has failed to prove any fraud, Dominick cannot be held liable for any failure to supervise

deGive. Further, even if liability could be imposed in A-809 the absence of fraud, see Blake v. Harris, Upham & Co., 75 Civ. 4428 (S.D.N.Y., verdict November 19, 1976), plaintiff has failed to establish a causal connection between the technical violations of the NYSE rules and the alleged losses sustained. Accordingly, the claims based upon violations of the NYSE rules must be dismissed.

Conclusion

Plaintiff testified that she wished her holdings to be "built up" for her old age. As aptly noted by counsel for the defendants, Mrs. Van Alen had her wish satisfied. Paul deGive took a \$125,000 account in 1953 and returned a one-million dollar account in 1970. While the increase was in part due to the proceeds of various loans taken out by Mrs. Van Alen, deGive's efforts did produce substantial profits and significant net growth. Indeed, there were losses in the bear market of 1969-1970. However, the evidence presented at trial establishes that the losses suffered by the plaintiff were the result of a skittish and unfavorable stock market, and that they were not the product of any fraud by the defendants.

Judgment should be entered for the defendants Paul deGive and Dominick & Dominick, Inc., dismissing the complaint with prejudice and with costs. Counsel for defendants are directed to submit an appropriate order of judgment.

SO ORDERED.

Dated: New York, New York
December 22, 1976

LAWRENCE W. PIERCE
U. S. D. J.

NOTICE OF MOTION FOR ATTORNEYS' FEES
DATED JANUARY 14, 1977

A-810

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
CANDACE VAN ALLEN, :
 :
Plaintiff, : 71 Civ. 5438 (LWP)
 :
-against- :
 : NOTICE OF MOTION
DOMINICK & DOMINICK, INCORPORATED :
and PAUL deGIVE, :
 :
Defendants. :
----- x

S I R S :

PLEASE TAKE NOTICE that upon the affidavit of Jeffrey A. Barist, sworn to January 14, 1977, the Opinion and Order of this Court dated December 22, 1976, and all prior proceedings had herein, the undersigned will move this Court by the Hon. Lawrence W. Pierce, U.S.D.J. at the United States Courthouse, Foley Square, New York, New York, on January 21, 1977, at 10:00 A.M. or as soon thereafter as counsel may be heard, for an order pursuant to Rule 54(d) F.R.C.P. requiring plaintiff Candace Van Allen to pay to defendants Dominick & Dominick, Incorporated and Paul deGIVE, as part of the costs taxed in favor of defendants in this action, an amount representing defendants' reasonable attorneys' fees incurred in the defense of this action, and for

Notice of Motion for Attorneys' Fees

A-811

such other and further relief to defendants Dominick & Dominick, Incorporated and Paul deGive as to the Court may appear just and proper.

Dated: New York, New York
January 14, 1977

Yours, etc.

WHITE & CASE

By

Jeffrey Beiert

A Member of the Firm
Attorneys for Defendants
14 Wall Street
New York, New York 10005

TO:

KAMERMAN & KAMERMAN, ESQS.
Attorneys for Plaintiff
500 Fifth Avenue
New York, New York 10036

AFFIDAVIT OF JEFFREY A. BARIST IN SUPPORT OF
MOTION FOR ATTORNEYS' FEES

A-812

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
:
CANDACE VAN ALLEN,
:
Plaintiff,
:
-against- 71 Civ. 5438 (LWP)
:
DOMINICK & DOMINICK, INCORPORATED AFFIDAVIT
and PAUL deGIVE, :
Defendants. :
----- -x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

Jeffrey A. Barist, being duly sworn, says:

1. I am a member of the bar of this Court and a member of the firm of White & Case, attorneys for defendants Dominick & Dominick, Incorporated ("Dominick") and Paul deGive. I make this affidavit in support of defendants' motion that the order and judgment in this case require plaintiff to pay to the defendants an amount representing the reasonable attorneys' fees incurred in the defense of this action.

2. On December 22, 1976, the Court rendered its decision in this action and found the plaintiff's case to be "without merit" and dismissed the complaint while granting

Affidavit of Jeffrey A. Barist in Support of
Motion for Attorneys' Fees

A-813

costs to the defendants. Defendants submit that the law, as discussed in the accompanying memorandum of law, permits this Court to award reasonable attorneys' fees to the defendants in an effort to mitigate the effects of the injustice worked upon defendants as a result of plaintiff's pursuit of her meritless claims.

3. This was only one of five actions commenced by plaintiff and her husband based upon essentially the same set of facts as were alleged herein. Candace Van Alen v. First National City Bank, Paul deGive and Robert Hoquet, 73 Civ. 76 (S.D.N.Y.) (the "Citibank action"); Candace Van Alen v. New York Stock Exchange, 73 Civ. 4204 (S.D.N.Y.) James H. Van Alen v. Dominick & Dominick, Inc. and Paul deGive, 72 Civ. 4178 (S.D.N.Y.); and James H. Van Alen v. Dominick & Dominick, Inc. and Paul deGive, Index No. 248/73 (N.Y. County) "the James Van Alen action." The duplicative nature of these actions has been set forth previously by defendants. The James Van Alen action in federal court was voluntarily dismissed, only to be reinstituted in State Court. Only two counts of what was originally a five-count complaint in the FNCB action have survived a motion for dismissal, and what remains is a minor point which Citibank's counsel has asked Judge Lasker to determine on the basis of the Court's decision in the instant action. In fact, plaintiff's counsel has conceded in a letter to Judge Lasker that "if Judge Pierce's

**Affidavit of Jeffrey A. Barist in Support of
Motion for Attorneys' Fees**

A-814

findings are conformed . . . then there would remain no issue for trial" as to the only remaining counts in the FNCB case. (A copy of Mr. Kamerman's letter is attached hereto as Exhibit A.) After this Court's decision, we requested plaintiff's counsel to dismiss with prejudice the James Van Alen action, but he has thus far declined to do so.

4. The baselessness of these multiple attacks is exemplified by the fact that the original complaint herein dated December 14, 1971, was followed by a first amended complaint dated April 11, 1972, which was in turn superseded by a second amended complaint on December 1, 1972 and, finally, a third amended complaint on December 16, 1974, upon which trial was eventually had. With each new complaint, plaintiff changed the allegations supporting her claims or the legal nature of the claims themselves. With each new complaint, the defendants were forced to respond to new and equally unfounded charges. For example, the periods in which churning is alleged to have occurred underwent revision in each of the amended complaints. The original complaint put in issue the period of February 11, 1969 through March 31, 1970; the first amended complaint went back to include transactions in 1968; the second amended complaint started the alleged churning on February 11, 1969, but eliminated certain transactions complained of in the initial complaint. The allegation

Affidavit of Jeffrey A. Barist in Support of
Motion for Attorneys' Fees

A-815

in the first amended complaint that churning occurred in 1968 was flatly contradicted by plaintiff's testimony at trial, where, as this Court found:

"She testified that deGive handled the accounts very well in 1968." Order and Opinion p. 27.

5. Further evidence of plaintiff's bad faith conduct of this action and the duplicative companion actions is provided by the exhaustive and unnecessary discovery taken by plaintiff. In the course of nine depositions lasting a total of nineteen days, two officers of the New York Stock Exchange, an officer of the Bank of New York and an officer of First National City Bank were deposed by plaintiff, but no one from any of those institutions was called at trial by plaintiff. Paul deGive was deposed for eight days. In addition, plaintiff served six sets of interrogatories on the defendants. A schedule of all depositions in this case and the related proceedings is annexed as Exhibit B. The extensive discovery was caused by plaintiff; defendants took a bare minimum of depositions. The result of plaintiff's conduct of unnecessary discovery was to drive up the costs of defending this action. Plaintiff should now be made to bear those costs.

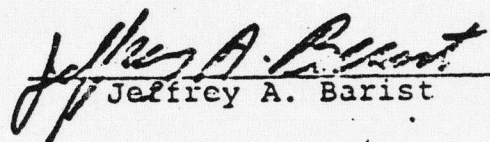
6. Throughout this litigation plaintiff's counsel was informed by me that defendants were in precarious financial condition. The record establishes that

Affidavit of Jeffrey A. Barist in Support of
Motion for Attorneys' Fees

A-816

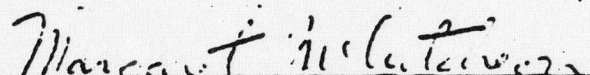
plaintiff made this case as complicated and expensive as possible, hoping to raise the cost of defense so high that the defendants would settle and pay off plaintiff's meritless demands. It is only fair, and justice will only be done, if plaintiff must now bear the real cost of those tactics by paying defendants' counsel fees.

7. The court should be aware that counsel fees for the defense of this action have already exceeded \$250,000, and disbursements amounting to \$9,000.00. Defendants stand ready to submit to the court documentation of the attorneys' fee incurred and to substantiate the reasonableness and necessity for those fees, if this Court so requires.


Jeffrey A. Barist

Sworn to before me this

14th day of January, 1977


Notary Public

Commission Expires March 30, 1979

EXHIBIT A
[Annexed to foregoing Affidavit]

A-817

Letter from Jerome Kamerman to Hon. Morris E.
Lasker, dated January 12, 1977

KAMERMAN & KAMERMAN
COUNSELORS AT LAW
500 FIFTH AVENUE
NEW YORK, N. Y. 10036

CHICKERING 4-5245

January 12, 1977

The Honorable Morris E. Lasker
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Re: Candace Van Alen v. First National City Bank, et al.,
73 Civ. 76 (M.E.L.)

Dear Judge Lasker:

In response to your request, I respectfully state that if Judge Pierce's findings as set forth by Mr. Lillie in his letter of January 6, 1977 are confirmed, then there would remain no issue for trial to Counts II and III of the above cited case.

I believe that at the present time, it would be most expeditious to hold this case in abeyance pending the decision to appeal or the outcome of an appeal.

Very truly yours,

Jerome Kamerman

JK/lb

cc: Michael W. Lillie, Esq.
Vincent R. Fitzpatrick, Esq.

SCHEDULE OF DEPOSITIONS

<u>Witness (Employer)</u>	<u>Case</u>	<u>Noticed By What Party</u>	<u>Date(s) Deposed</u>	<u>Was Witness Called as a Witness at Trial?</u>
1. William J. Crowe, Jr. (Dominick)	Dominick	Plaintiff	May 22, 1973	No
2. Paul deGive (Dominick)	Dominick	Plaintiff	March 9, 1972 September 14, 1972 October 30, 1972 October 31, 1972 November 1, 1972 November 2, 1972 May 23, 1973 September 4, 1973	Yes
Paul deGive (Dominick)	FNCB	FNCB	April 2, 1974	
3. Robert Hogue (FNCB)	FNCB	Plaintiff	February 1, 1973	No
4. Grover C. Jensen (BNY)	Dominick	Defendants	December 19, 1972 January 23, 1973	No
5. William McCarthy (NYSE)	Dominick	Plaintiff	January 31, 1973	No
6. Stafford McLean (FNCB)	Dominick	Plaintiff	January 3, 1973	No
Stafford McLean (FNC)	FNCB	Plaintiff	December 27, 1973	No
7. Frank McMahon (FNCB)	Dominick	Defendants	November 30, 1972 December 5, 1972	No
Frank McMahon (FNCB)	FNCB	Plaintiff	December 27, 1973	No

Exhibit B

[Annexed to foregoing Affidavit]
Schedule of Depositions

A-818

Continued Schedule of Depositions

<u>Witness (Employer)</u>	<u>Case</u>	<u>Noticed by What Party</u>	<u>Date(s) Deposed</u>	<u>Was Witness Called as a Witness at Trial?</u>
8. Thomas H. Mitchell (Dominick)	Dominick	Plaintiff	September 12, 1972	Yes*
9. Gordon S. Murphy, Esq. (Plf.)	Dominick	Defendants	March 27, 1974	No
10. Elliott Pincus (NYSE)	Dominick	Plaintiff	February 20, 1973	No
11. Avery Rockefeller, Jr. (Dominick)	Dominick	Plaintiff	September 11, 1972	Yes
12. Richard E. Thomas (FNCB)	FNCB	Plaintiff	February 16, 1973	No
13. Candace Van Alen	Dominick	Defendants	February 9, 1972 February 17, 1972 September 21, 1973	Yes
14. James Van Alen	Dominick	Defendants	September 20, 1973	Yes*
15. Mary Grace Watson (Plf.)	Dominick	Defendants	December 12, 1972	Yes*

* Deposition testimony at trial.

Schedule B, annexed to foregoing Affidavit
(cont'd)

A-819

AFFIDAVIT OF JEROME KAMERMAN IN OPPOSITION TO
DEFENDANTS' MOTION REQUIRING PLAINTIFF TO PAY
TO DEFENDANTS REASONABLE ATTORNEYS' FEES

A-820

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CANDACE VAN ALLEN,

71 Civ. 5438 (LWP)

Plaintiff,

AFFIDAVIT

-against-

DOMINICK & DOMINICK, INCORPORATED,
and PAUL deGIVE,

Defendants.

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

JEROME KAMERMAN, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and a member of the firm of Kamerman & Kamerman, attorneys for plaintiff. I make this affidavit in opposition to defendants' motion that the order and judgment in this case require plaintiff to pay to defendants reasonable attorneys' fees.

2. Plaintiff submits that the law, as discussed in plaintiff's accompanying Memorandum of Law, precludes the award of attorneys' fees in a case such as the case at bar.

3. Defendants failed to mention that plaintiff had ample opportunities to settle this case. Shortly after the complaint was served, plaintiff was offered a

Affidavit of Jerome Kamerman in Opposition to
Defendants' Motion Requiring Plaintiff to Pay
to Defendants Reasonable Attorneys' Fees

A-821

\$90,000 settlement. At various times during the course of the litigation, plaintiff had other opportunities to settle this case. Yet, believing that she had a strong case, plaintiff completed discovery and proceeded to trial. In fact, as plaintiff and her attorneys prepared for trial, little thought was given to a possible last minute settlement. In sum, plaintiff's actions have not been those of a person who was bringing a nuisance suit, but rather the actions of a person who believed in her case and followed through. Indeed, plaintiff is now considering appealing from the Court's decision herein.

4. Apparently, the actual reason for defendants' motion for attorneys' fees and disbursements, is an attempt to gain leverage as to plaintiff's contemplated appeal. In fact, defendants offered to abandon the herein motion, if plaintiff agrees not to appeal.

5. Defendants cite related law suits which plaintiff has instituted. Plaintiff submits that defendants are trying to create a smoke screen, in an attempt to punish plaintiff for being so bold as to assert her rights against a large brokerage firm, a large bank, and The New York Stock Exchange.

6. As another smoke screen, defendants argue that the fact that plaintiff amended her complaint three times is evidence of bad faith. Surely, nothing could be further from the truth. Defendants, at all times, had

Affidavit of Jerome Kamerman in Opposition to
Defendants' Motion Requiring Plaintiff to Pay
to Defendants Reasonable Attorneys' Fees

A-822

control of most of the evidence in this case. As plaintiff proceeded with discovery, she learned more about how defendants handled, or mishandled, her account. For example, through depositions and interrogatories, plaintiff learned that defendants had made no efforts to comply with the supervisory rules of The New York Stock Exchange.

She also learned, through an extensive deposition of defendant deGive, that he did not always follow his system in making trades for her account. It is ironic that defendants now seek to punish plaintiff for amending her complaint in order to give defendants notice of her contentions and to better sharpen the issues involved in this case.

7. Similarly, defendants contend that plaintiff's failure to call several of the witnesses whom she deposed was evidence of bad faith. Again, I must remind this Court that defendants and the institutions with which they were allied possessed most of the evidence involved in this case. Consequently, plaintiff had to depose a number of knowledgeable people. Plaintiff should not be punished because she did not waste the time of this Court by calling witnesses whom she felt were not needed to establish her case.

8. Defendants' attorneys assert that they expended over a quarter of a million dollars of billable time, in

Affidavit of Jerome Kamerman in Opposition to
Defendants' Motion Requiring Plaintiff to Pay
to Defendants Reasonable Attorneys' Fees

A-823

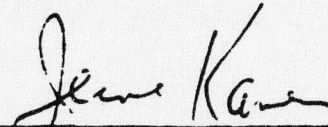
defending a case which they now say had no basis whatsoever. It is disgraceful that a law firm with the reputation that White & Case has, would say that they charged a client over a quarter of a million dollars for pre-trial preparation, even though they knew that plaintiff never had a case. I submit that the large amount of time which defendants are now claiming was required to defend this case is proof that there was a sound basis for plaintiff's contentions, requiring extensive pre-trial preparation to defend against plaintiff's valid claims.

9. Lastly, I want to remind the Court of the context in which this case was brought. For sixteen (16) years, defendant deGive had nurtured plaintiff's account, investing only part of her money at any given time and making mostly long term investments. Suddenly, defendant deGive began to make many more trades in plaintiff's account, most of which were short term. In the fourteen (14) month period covered by the complaint, defendant deGive lost nearly all of the profits that had been made in plaintiff's account in the preceding sixteen (16) years. The coup de grace was when plaintiff discovered that defendant deGive had prepared false diary entries in an attempt to make it appear that he had met with plaintiff before making each group of transactions. In sum, at the time the law suit was instituted, plaintiff had ample cause for believing that she had been defrauded.

Affidavit of Jerome Kamerman in Opposition to
Defendants' Motion Requiring Plaintiff to Pay
to Defendants Reasonable Attorneys' Fees

A-824

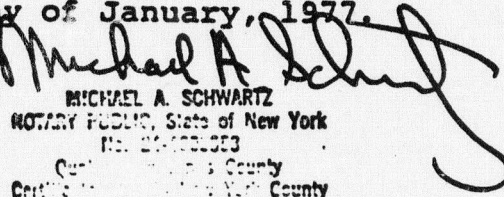
WHEREFORE, defendants' motion for an award of reasonable attorneys' fees and disbursements should be denied, plaintiff should be awarded the costs of this motion and any other relief which this Court deems proper.



JEROME KAMERMAN

Sworn to before me this 20th

day of January, 1977.


MICHAEL A. SCHWARTZ
NOTARY PUBLIC, State of New York
No. 25-0000003

County of New York
City of New York
Commenced on March 22, 1978

REPLY AFFIDAVIT OF JEFFREY A. BARIST IN SUPPORT
OF DEFENDANTS' MOTION FOR REASONABLE ATTORNEYS' FEES

A-825

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x
:
CANDACE VAN ALLEN,
:
Plaintiff, 71 Civ. 5438 (LWP)
:
-against-
:
DOMINICK & DOMINICK, INCORPORATED,
and PAUL deGIVE,
:
Defendants. :
- - - - - x

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Jeffrey A. Barist, being duly sworn, says:

1. I am a member of the bar of this Court and of the firm of White & Case, attorneys for defendants. I submit this reply affidavit in support of defendants' motion for reasonable attorneys' fees.

2. Mr. Kamerman's statement that "defendants' offered to abandon the herein motion, if plaintiff agrees not to appeal" has no basis in fact. No such offer by defendants' counsel has been made.

3. Plaintiff's counsel misstates the facts in referring to the settlement negotiations which were conducted in this case. After considerable discovery had

occurred in this matter, (not "shortly after the complaint was filed") it was evident that, as a business matter, settlement should be pursued. It was then clear that this case involving the analysis of a course of business between plaintiff and defendants over 17 years was going to take considerable effort in preparation, and considering the expense of the legal fees and the financial condition of our clients, peace might have to be bought, even though our clients firmly believed they had committed no wrong. Indeed, throughout this litigation, White & Case continually looked for ways to settle this matter in a manner which made business sense for our clients. That plaintiff did not accept establishes only that plaintiff was greedy.

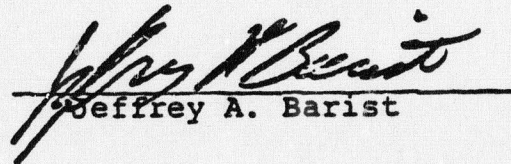
4. The amount of fees which White & Case incurred in this matter was the direct result of plaintiff's harassing tactics. Time after time, we were required to move to quash needless discovery. Significant legal fees were caused by motion practice required by plaintiff's tactics. For example, plaintiff served an untimely jury demand, resulting in a motion by defendants to strike the jury demand, which was granted by this Court. Similarly, plaintiff moved to amend the complaint to assert a fifth cause of action in a third amended complaint, and moved for summary judgment on that count. This extensive motion practice resulted in defendants being granted summary judgment by this Court on the fifth count of the third amended complaint. As stated

Reply Affidavit of Jeffrey A. Barist in Support of
Defendants' Motion for Reasonable Attorneys' Fees

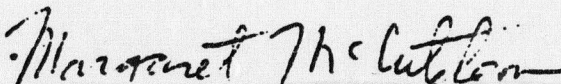
A-827

in our moving papers, if this Court deems it necessary, we are prepared to prove the reasonableness and extent of the legal services expended in the defense of this matter.

5. The simple fact is that even the filing of a baseless complaint will, given the liberal discovery provisions of the federal rules and the practical inability of summary judgment procedures where questions of fact are asserted, even frivolously, require the expenditure of enormous sums in defense, where, as here, the transactions in question are complex, cover a long period of time, and the plaintiff pushes its rights to discovery and procedural maneuvering and motion practice to the utmost. The fact that a case seeking millions of dollars is without merit does not, of course, mean it can be undefended.


Jeffrey A. Barist

Sworn to before me this
20th day of January, 1977


Notary Public

MARGARET MCCUTCHEON
Notary Public, State of New York
Qualified in New York State
Certificate filed in New York State
Commission Expires December 31, 1978

ENDORSEMENT ORDER (RE ATTORNEYS' FEES)
DATED JANUARY 25, 1977

INDEX NO. 71 CIV. 5438 (LMP)

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

CANDACE VAN ALLEN,

Plaintiff,

-against-

DOMINICK & DOMINICK,
 INCORPORATED and PAUL DEGIOVE,
 Defendants.

ORIGINAL

NOTICE OF MOTION
 and AFFIDAVIT

WEITZ & CASE
 ATTORNEYS FOR Defendants

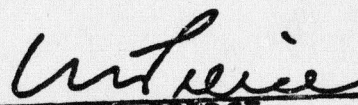
14 Wall Street
 Borough of Manhattan
 New York City
 RECTOR 2-1040

71 Civ. 5438, CANDACE VAN ALLEN v. DOMINICK & DOMINICK et ano.

Endorsement Order

Defendants' motion for attorneys fees, attached hereto, is hereby denied.
 An appropriate order of judgement shall be entered forthwith.

SO ORDERED.

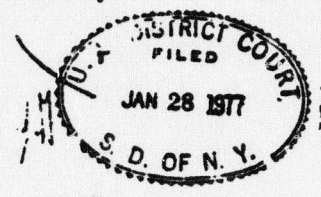

 LAWRENCE W. PIERCE
 U. S. D. J.

Dated: New York, N.Y.
 Jan. 25, 1977

FINAL JUDGMENT, DATED JANUARY 27, 1977

A-829

*12
10*



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
CANDACE VAN ALLEN,

Plaintiff,

-against-

DOMINICK & DOMINICK, INCORPORATED,
and PAUL DE GIVE,

Defendants.
----- x

:
:
:
71 Civ. 5438
(LWP)

: JUDGMENT
:

The issues in the above entitled action having been brought on regularly for trial before the Honorable Lawrence W. Pierce, United States District Judge, on November 8, 9, 10, 11, 12, 15, 16, and 17, 1976, and a decision having been duly rendered, it is

ORDERED and ADJUDGED that the plaintiff, Candace Van Allen, take nothing, that the action be dismissed on the merits, and that the defendants, Dominick & Dominick, Incorporated and Paul de Give recover of the plaintiff, Candace Van Allen, their costs ^{to be taxed} of this action, and it is

~~ORDERED and ADJUDGED that this Court, having been advised by defendants that they intend to make a motion for an order requiring plaintiff to pay defendants' reasonable attorneys' fees in this action, retains jurisdiction of this action for the purpose of considering such motion, and for that purpose only.~~

Dated: New York, New York
~~December 29, 1976~~

January 27 1977

Lawrence W. Pierce

LAWRENCE W. PIERCE
U. S. D. J.

JUDGMENT ENTERED - 1/31/77

*Raymond J. Bergman
CLERK*

313.27

PLAINTIFF'S NOTICE OF APPEAL,
DATED FEBRUARY 25, 1977

A-830

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CANDACE VAN ALEN,

Plaintiff,

-against-

DOMINICK & DOMINICK, INC.
and PAUL deGIVE,

Defendants.

NOTICE OF APPEAL

Index No. 71 Civ. 5438 (LWP)

Notice is hereby given that Candace Van Alen, plaintiff
above named, hereby appeals to the United States Court of Appeals for
the Second Circuit from the final judgment dismissing plaintiff's
complaint, entered in this action on the 31 day of January, 1977.

Dated: New York, N.Y.
February 25, 1977

KAMERMAN & KAMERMAN
500 Fifth Avenue
New York, NY 10036
(212) 244-5245
Attorneys for Plaintiff

To: WHITE & CASE
14 Wall Street
New York, N.Y. 10005
(212) 732-1040
Attorneys for Defendants

Clerk
United States District Court
Southern District of New York
Federal Courthouse
Foley Square
New York, N.Y. 10007

**DEFENDANTS' NOTICE OF APPEAL, DATED
FEBRUARY 25, 1977**

A-831

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
FEB 25 1128 AM '77
S.D. OF N.Y.

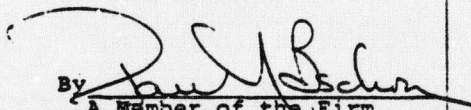
-----x
CANDACE VAN ALLEN, :
 :
Plaintiff, : 71 Civ. 5438 (L.W.P.)
 :
-against- : NOTICE OF APPEAL
 :
DOMINICK & DOMINICK, INC., :
and PAUL deGIVE, :
 :
Defendants. :
 :
-----x

Notice is hereby given that Dominick & Dominick, Inc., and Paul deGIVE, defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the order denying their motion for reasonable attorneys' fees only entered in this action on the 26th day of January 1977.

Dated: New York, New York
February 25, 1977

Yours, etc.

WHITE & CASE

By 
A Member of the Firm
Attorneys for Defendants
Dominick & Dominick, Inc.
and Paul deGIVE
14 Wall Street
New York, New York 10005
(212) 732-1040

TO:

KAMERMAN & KAMERMAN
500 Fifth Avenue
New York, New York 10036

SHAFER, McKEEVER and FITZPATRICK
842 Hungerford Court
Rockville, Maryland 20850

Attorneys for Plaintiff

1 Copies Received
Date May 6, 1977
Firm W. L. Hite & Sons
By James H. Hite